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James John
R E P O R T S

O F

C A S E S

ADJUDGED IN THE

At. Bar. Court of King's Bench,

From Easter Term 12 Geo. 3. to Michaelmas
14 Geo. 3. (both inclusive.)

With some select Cases

In the Court of Chancery,

A N D

Of the Common Pleas,

WHICH ARE WITHIN THE SAME PERIOD.

TO WHICH IS ADDED,

THE CASE OF GENERAL WARRANTS,

A N D

A COLLECTION OF MAXIMS.

BY CAPEL LOFFT, ESQUIRE, OF LINCOLN'S INN.

D U B L I N:

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P R E F A C E.

FROM the excellence of our constitution, the dignity of our laws, the abilities of those by whom they are administered, and the learning and authority of our reporters, through a long series of ages, and of some yet living, I feel much awe in revolving within my own mind, and still more in offering to the profession, and submitting to public examination, the collection of cases contained in the ensuing sheets. But all these circumstances, though they heighten the difficulty, yet heighten the desire; and I should hope would tend to excuse the success of the attempt, if it should be inadequate to my wishes.

And though a preface is generally designed as an apology for the work, and therefore ought not to want an apology itself, yet, before I proceed farther, I should wish to obviate any prejudices which my reader may entertain, even from this preface, which he can hardly be more sensible than myself to be much inferior to the gravity and dignity of the subject. Indeed upon other terms I must not have written any. The sentiments of a young and private man bear too wide a disproportion to those which I have to offer in the body of the work. And they will do ill, if there are any, who shall judge from the weakness of my own thoughts of the strength of those which are not properly my own. And if I shall appear to have expatiated warmly here, they will recollect I do not pretend to speak to them beyond; And that where one loves, be the object however worthy, (and what can easily be found more worthy of love and admiration than the voice of our laws speaking to us in judgment) the measure of what is said is apt to proceed rather from affection than strict rule; more from what one *feels* than from what is *necessary*.

However, if any thing in this preface shall be thought to approach, though at a great distance, to the weight and importance of the occasion, it will answer my wishes; the much that falls short measures with my ability: But neither the one or the other will affect the *CASES* themselves, and the *POINTS* of *LAW*, which is not merely the *principal* but the *only* thing in this volume in which I venture to ask for my reader's attention; of whose candour I desire

now to be heard with indulgence of the motives which have induced me to an undertaking of some labour; and in which the person attempting, the attempt itself, and the execution, must owe much to a favourable interpretation.

As an *Englishman* I cannot help loving and revering the laws of my country; as a *member of the profession* of the law I am attempting to discharge a debt which Lord *Bacon* says every man incurs to his profession; and, as I cannot pay it of mine own, to pay it in that coin which I have endeavoured to treasure up in the course of my attendance on the courts: As a *man* it were a shame if I could contemplate with coldness and indifference *those laws* which have made the best provision for the rights of humanity; are the general admiration of mankind, and the common support and protection of *natives, denizens, and aliens*; nay, as far as may consist with the public safety, of *enemies* living beneath their shadow. *Laws*—at which the breasts of philosophers have burned with rapture! Which gladden the heart of the peasant in his cottage, knowing himself not beneath their defence. Those benign and venerable laws which add glory, stability, and happiness to the THRONE; make the *Noble* greater and more unenvied in his dignity; give power to *all*, for their own security, and the service of the public; but for oppression to *none*. Those LAWS which the most acute sagacity has been employed to investigate, and which the most severe judgment has approved with admiration; which four hundred years ago had the encomium from an historian not enthusiastic in his praises, a foreigner, and of an hostile country, as the BEST LAWS for PRINCE and PEOPLE: Which result from a constitution which one of the wisest historians of antiquity had pronounced must be the best; “a composition of the three simple forms of other governments; which constitution the *Athenian* teacher of wisdom had defined by anticipation “a monarchy subsisting in laws;” which the noble orator, philosopher, and senator of *Rome* had recognized as the most excellent, from the mild severity and equitable justice which would flow from it; and which a politician, esteemed the deepest of antiquity, has delineated after their traces, and appears only to have been mistaken in thinking it too highly finished and too delicately tempered to be permanent: A mistake which the experience of ages has refuted, and which ages more may refute. Those LAWS and that CONSTITUTION which have their

their roots in the abyſs of unfathomable antiquity, their branches over the mighty empire which, under Providence, they formed and preſerved—and which grew, from ſuch a ſyſtem of liberty, juſtice, peace, concord, and order, double that of the *Roman*, in its utmoſt extent—and their head in heaven: Thoſe laws and that conſtitution which neither the blind ambition, nor the miſtaken counſels, nor the unhappy fortune of kings, the pride and contention of our ancient nobles, the dark ſtorm of ſuperſtition, the waves and ſea of popular fury, nor the mining of time, nor the lightnings of war, darted on *Britain* by united enemies, each ſingly formidable to any other ſtate, and ſtrong in our domeſtic diſſenſions, have now for ages been able to deſtroy. Deſtroy? The ſhock of ages, tyranny, ſuperſtition, popular madneſs, all in their turn contributed to mature their perfection, to ſtrike them forth in their meridian luſtre, to clear the obſcure, retrench the weak and ſuperfluous, aboliſh the dangerous, ſtrengthen the beſt; and erect a model of legal liberty for the inſtruction and benefit of mankind, as well as the delight and wonder and bleſſing of *Engliſhmen*: For which not only ſo many heroes have died in the field or bled upon the ſcaffold, but ſo many of the firſt abilities and integrity have toiled through a life of labour, of danger, and often with public calumny for their reward, upon the *Bench*, to preſerve them; ſo many to frame them, adjust their proportions, direct their uſes, and connect new parts from time to time, as occaſion demanded, to the general ſyſtem, in the *Senate*—I wrong my country in borrowing an imperfect name from immortal *Rome*—in the PARLIAMENT OF ENGLAND; which, when it really repreſents the people, and juſtly executes its exalted truſt, may look down on all other human inſtitutions with a conſcious ſuperiority, and compaſſion for their imperfections.

I take laws amongſt men, in the idea in which they appear to me moſt perfect, to be regulations of ſociety to which the members are bound to ſubmit, as being *neceſſary* for the liberty and happineſs of the *community*, agreeable to reaſon and the divine law, and ſupported by ſuch reſtraints and penalties *only* as are *indispensably* requiſite for the end of the *public ſecurity and welfare*, and founded either on the expreſs conſent of all who are to be bound by them, or virtually by thoſe whom they freely chooſe and depute to conſent for them. Any reader will judge how this will apply to our conſtitution, and what degree of praiſe that
conſtitution

constitution, merits if it does apply. Let my veneration for this constitution plead my excuse in the bold attempt I have hazarded of publishing these cases.

I had intended to call them simply a collection of cases, being sensible that none are *properly* REPORTS but such as are published by authority, or are the judgments of learned and reverend judges, committed to the public by themselves.

But as reports of cases is grown a familiar name in the titles of books, at many different periods, I have not avoided the *name*, since, though I pretend to *no authority*, it is an additional *pledge* of that fidelity to which I *do* pretend; and which I am *bound* by interest and duty to *preserve*.

JUDGMENTS, it is true, as the GREAT SIR MATTHEW HALE observes, are *but* EVIDENCE of *law*, and not LAW; yet, as he subjoins, they are the HIGHEST EVIDENCE: And it would be very impertinent for me to observe what weight the judgments given within the period comprehended in this book ought to carry with them. I know that it is felt and acknowledged.

But as JUDGMENTS are but *evidence* of law, REPORTS are but *evidence* of judgments; and stand, therefore, a step *lower*. Yet farther, I must descend still *another* step, and freely confess, what my reader would have understood perfectly without me, that these reports are *far* from the *best* evidence of these judgments. But with this I can assure him (and I know I must speak to those who are best able, and were most concerned, and bound to refute me, if I were speaking falsely, and whose censure, as I should in the highest degree merit, I could least sustain) that I have not *wilfully misrepresented* or *neglected* any of those judgments. They are *all* within the memory of almost the whole *bar*, and of all the *judges* who delivered them; of whom the public has lost *none*, having suffered only (and there greatly indeed) in the Exchequer, in which court none of the notes of the cases in this book were taken.

Still how shall I reply to the objection which must be made, that when I acknowledged the difficulty and the importance of such a work, and the extraordinary merit of those who have been engaged in it before me, I should presume to undertake it?

I must partly answer, that many of these learned and excellent men are now no more upon earth; and that I am sure, valuable as their labours were, they would have
 sooner

sooner burned them than have suppressed the efforts of industry in the profession, which they loved and honoured, which they adorned and so much benefitted by publishing their works, if they had considered it as a prohibition to posterity to attempt a labour in which they had thus excelled. The best single work of genius and learning would be bought too dear if it were to deter all subsequent ages from an endeavour to do any thing of a like nature. One could have resigned an *Homer*, or even (which perhaps is more) *Shakespeare*, if they were to be enjoyed upon the hard terms of silencing all inferior efforts. Because there has been a *Raphael*, a *Vandyck*, a *Corregio*, a *Titian*, was it fit that painting should be at a stand? Or should sculpture drop the chissel because there had been a *Phidias*, an *Angelo*, a *Roubilliac*? There would not have been these progressive honours for that art to boast if artists had reasoned thus: And when there has been a *Roubilliac* every man has a right to be as near him as he can; or to excel him if he is able: And though he should be satisfied he could never do this, there is yet room for fame in a much inferior degree of excellence. Should we have no music because there has been an *Handel* and a *Purcel*? or live without houses or churches because there has been *Vitruvius*, *Jones*, and *Wren*? or have no physicians because we have had *Sydenham* and *Meade*? or no history because there has been *Herodotus*, *Livy*, *De Thou*, *Clarendon*? or have no legislators or judges because there has been a *Solon*, an *Alfred*; an *Hale*, an *Holt*? or no defence because we were once defended by *Drake*, *Vernon*, *Boscawen*, *Marlborough*, *Wolfe*? or no philosophy because we had *Bacon*, *Boyle*, and *Newton*? or shall there be no christians because there was once primitive christianity? or rather the more excellent and useful any thing is ought not the labour to be the more general in those whose study and opportunities are any way adapted to it? And if we allow encouragement to second, third, and much lower classes, in works even of pleasure and imagination, ought not a man to expect the same indulgence who is bringing something to the stock of the public use, where, if he fall short of any considerable fame, he may yet do service?

Indeed, such restrictions would do much worse than exclude me; nor should we have had that excellent living reporter, whose works make my apology the most difficult if he had resolved that because so much had been done admirably

admirably it would be wrong to attempt doing any thing well for the future.

But I am now to speak in answer to that objection of the *living* reporters. I don't know that there ever were fewer since the beginning of the year-books, now above four centuries and an half: And I gladly acknowledge their merit as remarkable as the smallness of their numbers. But if one *bad* reporter should be added it would be his own loss and misfortune; if you will his folly—or, if you choose to say—his crime; it *can* be no prejudice to the *good*: But if the cases I have to offer shall turn out not so bad (as I am sure it will be my own fault if they are not far from useless, considering who were the judges, what the questions, and what have been the decisions) I flatter myself it will be a pleasure to them that their labours have encouraged a young man to labour in his profession; with unequal powers, but not with little industry; nor, he hopes, it will appear, with little fidelity.

But the great stress will be, that these cases are *principally* in the King's Bench, and the public have assurance they may expect them from a reporter whom they highly value from experience. I am glad that they do expect them: I should be sorry they were to trust to my little skiff only to conduct them through the ocean of legal knowledge, vast for ages back, and so widely extended in modern times. But I am sure *that* reporter is too well *established* and too well *deserving* to be hurt by this work of mine: And I am as far from the *madness* of expecting as those who know me will be convinced I am from the *malignity* of wishing it. There have been concurrent reporters for a long time back; so that I hope, whatever reporters there are, and however excellent, there is room for me, without injury to the living or the dead. And though I might have much more reason to fear than I can give cause of umbrage, I wish that my fellow labourers in the vineyard may rather *all* exert themselves than that *one* should be kept out.

I do not apologize, therefore, to any gentleman who has reported or means to report any cases which I have taken; I think it would be more arrogant than humble if I should; neither do I apologize with the public; none of whom are bound to be purchasers of any book; nor, when they have purchased it, to form any other opinion than their own judgment shall enable them and their temper dispose them to form. I cannot apologize to the public for endeavouring to serve them in some way or other—it were more than
infamous

infamous in any man not to endeavour it: And I thought I could not attempt to serve them in a more natural or less ostentatious manner than in the way of my profession, and by giving them not my own thoughts and opinions, which I shall be sparing to do till I think they may deserve their notice, but the thoughts, opinions, and judgments of those who, I am sure, *must* deserve and are secure of their notice, and upon matters of the highest importance and most public concern, as to *some* of these cases, and of concern to the *profession*, more or less, I hope, as to *all*; if it be true that the smallest degree of legal knowledge ought not to be neglected.

In point of fact, too, I must observe this, that in a few years constant attendance I have hardly known a case of any importance, either in law or equity, settled upon the authority of a single reporter, however eminent and respectable; but that I have known (and there are many who know it better) numbers of cases, where an obscure point in one reporter, though of no ordinary merit, has been made clear by reference to another, where the true gist of the question has been ascertained, and the true reasons of the judgments, by lights drawn from the *concurrence*, nay, sometimes, from the *opposition* of various reporters. And I need not say that a very strong part of the evidence which we have for the most important and most certain of all histories arises from the independent testimony of distinct reporters, contained in a volume too sacred to be named with this.

I would now desire to speak something of the general conduct and design of the work I have attempted.

In cases of importance those who have attended the courts will not be surprized if, besides the *substance*, I have often been struck with the *form* of an argument; the *exordium*, connexion, and close: And they will at least excuse, I flatter myself, the attempt which I have sometimes made of retaining as much as I conveniently might, and was able, even of these which if not strictly necessary appeared graceful, and, as all just ornaments always are, subservient to use. I have observed in some of the greater arguments that structure and composition, perspicuous order, and elegant dependency of which I am sensible much is lost, by the unavoidable contraction of the argument, in many instances by the omission sometimes of the words of the speaker, and the use of others less apt of my own; and by other causes—not the least of which will be, that you cannot *hear* the speakers, but must be content to read.

This

This however, I am sure, if I could have transmitted the pleadings as they were spoken, I should easily have justified myself in more instances than one, to a great part of my readers, notwithstanding the length. I think, I should have attained, what Lord BACON observes, in his preface to his law arguments, is wanting in the more compendious method, a delineation, and tracing out a form of argument, which the younger students might imitate with pleasure and advantage. For the law is injured if it be thought so dry and jejune a study as some have supposed; on the contrary I hope, it is generally allowed to be a liberal, a noble, and a very extensive science, nearly connected with the other arts and sciences in general; however remote some of them may appear: Since nothing that raises the mind, extends the imagination, informs the judgment or rectifies the will, nothing virtuous, nothing wise, nothing graceful can be unsuitable to the character of an *English* lawyer: who is properly defined by Lord Holt, a *minister of right and justice*; who by the very MAXIMS of his profession is to be above mercenary and sordid interests; and who is admitted to the fullest and most distinct view of our laws, the accumulated wisdom of above a thousand years, and of the wonderful and divine fabric (I think, I cannot say too much, when I call it divine) of this our constitution. Nor, particularly, can a chaste and manly eloquence misbecome him; which *must* be *useful*; for none teach so forcibly, so fully, so immediately, as those who can most *agreeably* persuade; if they will apply those powers of persuasion to their *proper* end. I hope these observations will not be imputed as vanity to the maker of them, who speaks of the profession with more love and sincerity, as I readily again confess, than either abilities or need;—or perhaps policy with regard to his personal reputation, which might rather have been served by not so free an avowal that he sees that excellence which he can *only* see. But if little appears here of the *grace* of these arguments, the fullness of them in some instances may contribute to their use; and where I have taken *too much* it will be no hurt to my *readers judgment* to reject the *superfluous*; if I had taken too little by trusting to my own I should have paid myself a compliment with little costs; but perhaps not much to his satisfaction.

Sensible, how much more the dialogue strikes one than bare narrative, I have generally preferred it to saying this or that advocate said thus or thus. And frequently, when I have begun obliquely in the form of narrative, I have
broken

broken off where the passage struck me and continued the argument in the person of the speaker, hoping that my readers will be affected as I have been, and be most pleased when they have occasion to think least of the reporter and most of the speaker; in argument, but particularly in the judgment.

There will be found inaccuracies in my language, I doubt not; of some I am conscious; others may have escaped me. I would wish any who might read these pages to find as few defects of this kind as may be; but where they do find them, I hope they will not reject the substance because they dislike the form; or say this is inaccurate, and therefore the judge could never say it:—But examine whether it be justice, law, and reason; examine whether in *fact* (which they may easily know in such recent cases) the principle was laid down; and then they have my full leave to place the inaccuracy to my account, if they will place the good sense, law and authority, to the account of those to whom it belongs.

With respect to orthography, the reader may observe some words originally *Latin* derived through the medium of the *French*, spelt with the characteristic *u*; and sometimes the same words without—I have omitted the *d* sometimes in privilege and alledge and such words; and sometimes inserted it. I hope neither party will be angry, as I have done my best to please both in a matter which I think perfectly innocent, and in which, much may be said on both sides.

But now to return to the substance—I own I have thought Lord *Holt's* modesty made him almost *unjust*, when he supposed that those scrambling reports which he mentions, would make posterity think ill of his understanding and that of his brethren on the bench. For my own part, I do not think I shall utter any absurdities in reporting the judgments of the cases; because I think, I shall say nothing in substance but what was said by the court; but if I should, I know where the blame will lie: And it is easier and readier for me to expect posterity will think I was a blockhead, than it will to make the most remote ages of posterity forget who were the judges who presided during the period included in these notes; and while they shall remember *that*, I have no fear that any mistakes of mine shall do their memory a wrong; and yet, I have done a good deal to avoid any.

The arguments, except where the case was new or very important, will be found generally not long: Though I did
not

not choose to omit them even in smaller cases; because they lead the mind to consider and understand the point of decision.

The JUDGMENTS are taken generally at large; and often almost *verbatim*. And though I have used short-hand for almost all the notes, I hope I shall not be thought prolix in the manner in which I have taken them.

I own the authority of the venerable PLOWDEN, and of the author of the REPORTS, which by way of eminence are so called, weighed with me greatly: And I wish they had an effect on the *execution* proportionable to that which they had upon the *design*; and had enabled me to reach the mark as they excited me to aim at it, and shewed me where it stood, having indeed for their part erected it on so admirable a foundation, on so fair an eminence, and so much to the ornament and benefit of the profession.

In them you will find the JUDGMENTS *exact* in form, the *reasons* and principles *entire*, their force, dependence, and connexion preserved; and even in *collateral* points a vast magazine of learning, besides that which enriches them in direct application to the principal matter. For they thought of law and decided it not as a matter of *memory*, but as a science; and therefore did not consider *bare unconnected facts*, generally, and divested of their particular circumstances, but were accurate and curious in observing the distinctions, qualifications, and exceptions in the application of general rules to particular cases; they looked not on the shell and corpse, but on the *soul* of the law: Yet they were fond of general rules as the parents of certainty; but they kept them within their limits so as not to work an absurdity or *injustice*, and sometimes raised particular rules into general, so far as the reasons were general. The law is still considered as a science and decided on *similar* principles, and, as I have heard a learned and eminent practitioner affirm, much the greater part of COKE is yet law; so much indeed as almost the *whole*. And yet those who go not back to the source, are apt to suppose that our modern law is a thing of yesterday, whereas the statutes have made the principal alterations, and that rather in particulars than generals. But common-law still prevails in a very considerable extent, and, as was truly said in the time of *Edw. 4th*, is as old as the *world*; being no other than common sense and justice brought down indeed, and applied, to particular circumstances of our policy and constitution, which have given rise to *rules* long since *settled*. And you hardly ever hear at this day a dispute
about

about principles of common law, almost infinite as they are, but about the *application* of them to the case in question.

And at this time law is considered in a more complicated and extensive view than perhaps ever before, from the increase of statutes, the growth of arts and commerce, the various dispositions of property, and the fraud and violence resulting from so many jarring interests and passions, as are the growth of a wealthy and civilized society, in which both virtues and vices have a larger scope, and vices particularly a more *visible* and *formidable* operation. In such a state therefore, when the law of *commerce*, of general policy, and of *nations*, is become so large a part of the law of *England*, when precedents and cases are so multiplied, and furnish such a labyrinth of argument, it is not merely of curiosity but of *necessity* to see why, by what rules of law, by what application of precedents, with what limitations and under what circumstances, a particular case was decided; and not simply the heads of the case, and on what side judgment was given. And I observe this fullness with regard to the circumstances of the case and reasons of the judgment has been adopted by one of the latest of our reporters, and one of the best of this or any time.

And to endeavour after these examples is doubtless right, and I hope not useless though one fall far short.

I do not mean, in speaking of reasons and principles, that cases rest, or ought to rest, upon the refinements of arbitrary, vague and private reason; but I mean that there are many cases (most indeed upon wills) that fall under no express precedent, or particular provision, but which principles and analogy *must* govern: And that when precedents *do* apply, it is not useless to observe to what extent and in what manner; lest we should mistake the *true* principles of the decision, and under the shadow of *imaginary* precedents wander into error and delusion.

The cases in this collection, with that of a second volume preparing for the press, which are somewhat particular, are these: The case of General Warrants; the *Negro* cause, and the case of *Lee* and *Gansel*; the one pointing the extent of *personal* liberty in this country, the other of *legal* coercion:—The *Minorca* cause, in which the extensive privileges of the *British* constitution to protect any single individual from arbitrary punishment, by any power in any part of the empire, were strongly manifested; the *Grenada* cause, which asserted the liberty of an whole island in a very material

material point; the case of *Bolt* and *Purvis* concerning the privileges of the *East India* Company, and the judgment in the case of corruption in the *Hindon* election, in which the fundamental principle of our constitution was vindicated. —And of more private causes, the case of *Clark* and *Johnson* on a gaming contract of a servant with his master's money, whether the master shall bring the action and have the evidence of the servant; the two remarkable bankruptcy cases of *Spotwood* and *Grey*, and of *Fisher* and *Fordyce*; with a late very particular one determined in *Easter* term last 1776; the case of *Jewson* and *Read* on the custom of *London*; the case of *Martin* and *Hynde* last *Easter* term, on the engagement of the rector to the bishop, for providing a competent subsistence for his curate; the case of non-residence the same term; the determination of the court of King's Bench how far, and upon what terms a discovery shall entitle the party discovering, to bail or to discharge, in the case of *Mrs. Rudd*; the case of *Morgan* and *Jones*; the case of revocation on Mr. *Lacy's* will; *Eyre* and *Popham* on specific performance; *Hatton* and *Hookey* on double legacies; the case of election on general *Pulteney's* will; *Vallejo Wheeler* on barratry; the cases of cross remainders, or *Burville* and *Burville*, and *Wright* and *Holford*. —And others.

I flatter myself the example of SIR JAMES BURROW, and the sincerity of my intention will be my shield, from the displeasure of those high and honourable courts whose decisions I have taken; and so far as I shall appear to have done it honestly, I hope for some degree of their approbation: If in any respect I have done otherwise, the cases are too recent for me to pass unobserved or uncondemned; though were I not confident that I stand clear of this, my own heart would be my heaviest condemnation.

I have said thus much of the reasons which have induced me to the publishing of these cases; of the assurance I have that I shall not be judged unexamined, and that when examined, my worst censure will be that my intention was better than my power. I stand rather early in life for such an attempt, and but just beyond the threshold of my possession; I have just mentioned some of the most material causes, and the manner in which I mean to report them. I submit the whole respectfully, not with confidence, but with a contented hope, to the judgment of the profession, in a case where I have nothing to hope, but according to the truth and fidelity with which I shall appear to have acted;

acted; and the degree of use in which they may serve the profession must measure, in a great proportion, what advantage or reputation the author may expect. Of some degree of reputation, he owns he is ambitious: He thinks it not an illiberal nor a disingenuous profession, that he wishes some encrease of honest estimation, in due season, and with proper assiduity, in that line of life, in which duty and his inclination have prompted him to labour. But even more than he can wish for an honest success and credit, in the path and duties of his profession does he pray that Providence may avert from him and that profession, the obtaining or desiring of that success dishonestly. This at least he is sure, that there are other paths to success (whether he succeeds in them or not) than fraud and indirection; since, notwithstanding the common slander on the three professions, they have all (and not least the law) been distinguished in all times by men who have advanced constantly in their integrity, have preserved it in the highest honours, and preferred it to those honours, to their fortunes, lives, and every earthly endearment when they came in competition. And thanks to the vigilance of the judges, the sanctity of our laws, and the wholesome severity of justice, there is little encouragement to any who would underprop a villainous design by base, unworthy, and scandalous artifices: And while all fair diligence is honoured in every cause, they will consider what reason there is to imagine that dishonest or iniquitous inventions will be prosperous or endured in any.

I have seen many instances in the few years observation I could make to persuade me, that the conduct which best becomes a liberal and an honest man, is generally most serviceable both to the client and those concerned for him: And whatever in these notes may tend to communicate any useful precedents, to the furtherance of justice, the discouragement of iniquity, the honour of the laws, and consequently of the profession and public, I shall be happy to have imparted. The reader will *judge*; it is my business only to *report*, and to wish that so much and no more may receive his approbation as shall really, in any respect, deserve it.

A

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Note, This case was not taken by myself, but communicated by the favour of a gentleman to whom I am much obliged, and whose permission I have to publish it.

John Wilkes, Esq; *against* Wood.

THE CASE OF GENERAL WARRANTS.

AT the court of *Common Pleas*, at *Westminster*. Sittings *Middlesex* after *Michaelmas* term, before Lord Chief Justice to wit, 6th Pratt, John *Wilkes*, Esq; plaintiff; Robert *Wood*, Esq; of Decem-ber 1763. defendant.

In an action of trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers, &c.

The plaintiff's counsel were—

Serjeant *Glyn*, Mr. Recorder *Eyre*, Mr. *Stow*, Mr. *Wallace*, Mr. *Dunning*, Mr. *Gardiner*.

The defendant's counsel were—

Solicitor-General *Norton*, Serjeant *Nares*, Serjeant *Davy*, Serjeant *Yeates*. Attorney for the plaintiff, Mr. *Philips* of *Cecil-street*.

For the defendant—

Philip Cartaret Webb, Esq; Solicitor to the Treasury, and Mr. Secondary *Barnes*.

The

[2] The special Jury—

Plukenet Woodroffe, Esq; of *Chiswick*; *William Baker*, Esq; of *Isleworth*; *William Clark*, Esq; of *Edmonton*; *James Gould*, Esq; of *Edmonton*; *Stephen Pitt*, Esq; of *Kensington*; *Nathaniel Turner*, Esq; of *Hampstead*; *Jonathan Richardson*, Esq; of *Queen-Square*; *John Weston*, Esq; of *Hatton-Garden*; *Harry Blunt*; Esq; of *Hatton-Garden*; *Henry Boslock*, Esq; of *Hatton-Garden*; *John Boldero*, Esq; of *Hatton-Garden*; *John Egerton*, Esq; of *St. John's-street*.

Mr. *Gardener* opened the case, with declaring the foundation, that on the 30th of *April* last, Mr. *Wood*, with several of the king's messengers, and a constable, entered Mr. *Wilkes's* house; that Mr. *Wood* was aiding and assisting to the messengers, and gave directions concerning breaking open Mr. *Wilkes's* locks, and seizing his papers, &c. for which Mr. *Wilkes* laid his damages at five thousand pounds.

Serjeant *Glynn*, then enlarged fully, on the particular circumstances of the case, but remarked that the case extended far beyond Mr. *Wilkes* personally, that it touched the liberty of every subject of this country, and if found to be legal, would shake that most precious inheritance of *Englishmen*. In vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a secretary of state. Mr. *Wilkes*, unconvicted of any offence, has undergone the punishment. That of all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our most private concerns, affairs of the most *secret personal* nature, no reparation whatsoever could be made. That the law never admits of a *general search-warrant*. That in *France*, or *Spain*, even in the inquisition itself, they never delegate an *infinite* power to search, and that no magistrate is capable of delegating any such power. That some papers, quite *innocent* in themselves, might, by the *slightest* alteration, be converted to *criminal* action. Mr. *Wilkes*, as a *member of parliament*, demanded the more caution to be used, with regard to the seizure of his papers, as it might have been naturally supposed, that one of the *legislative* body might have papers of a *national* concern, not proper to be *exposed* to every eye. When we consider the persons concerned in this affair, it ceases to be an outrage to Mr. *Wilkes* personally, it is an outrage to the *constitution* itself. That Mr. *Wood* had talked
highly

highly of the power of a secretary of state ; but he hoped by the verdict he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would fling our liberties into a very unequal ballance. That the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of *Englishmen*. [3] That their resentment against such proceedings was to be expressed by large and exemplary damages ; that trifling damages would put no stop at all to such proceedings : Which would plainly appear, when they would consider the persons concerned in the present prosecution, persons, who by their duty and office should have been the *protectors* of the constitution, instead of the violators of it.

Mr. *Eyre*, the Recorder of *London*, then stood up : He apologized to the bench for appearing in the present cause, considering the office he bore, but that he thought it was a cause which affected the liberty of every individual.

The Lord Chief Justice desired he would make no apology. He then observed, that the present cause chiefly turned upon the *general question*, whether a secretary of state has a power to force persons houses, break open their locks, seize their papers, &c. upon a bare suspicion of a libel by a *general warrant*, without name of the person charged. A strange question, to be agitated in these days, when the constitution is so well fixed, when we have a prince upon the throne, whose virtues are so great and amiable, and whose regard for the subject is such, that he must frown at every incroachment upon their liberty. Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his *own bosom*. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an *act of parliament* itself, is sufficient to warrant any proceeding *contrary to the spirit of the constitution*.

Secretary *Williamson*, in *Charles* the second's time, for backing an illegal warrant, was sent to the Tower by the House of *Commons*. The jury, he observed, had no such power to commit ; he knew it well ; but, for his part, he wished they had, as he was persuaded they would exercise it, in the present case, as it ought to be.

On the famous certificate in Queen *Elizabeth's* time, how far a man might be detained by a warrant of a privy counsellor, the answer of the judges, even in *those* days, confined it to *high treason only*, and the power to arrest to be derived from the personal command of the king, or a privy counsellor.

[4]

counsellor. He then congratulated the jury, that they had now in their power the present cause, which had been by so much art and chicanery so long postponed. Seventy years had now elapsed, since the revolution, without any occasion to enquire into this power of the secretary of state, and he made no doubt but the jury would effectually prevent the question from being *ever* revived again. He therefore recommends it to them to embrace this opportunity (least another should not offer, in haste) of instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.

N. B. The Recorder shone extremely.

The first witness on the prosecution was *Matthew Brown* —says, that he is butler to Mr. *Wilkes*. That on the thirtieth of *April* last, about nine o'clock in the morning, *Watson*, *Blackmore*, *Mony*, and *Man*, king's messengers, and *Chisholm*, a constable, came to Mr. *Wilkes*'s house. That *Watson* followed Mr. *Wilkes* into the house, and *Mony* came next; *Blackmore* and *Man* followed after. That this witness never heard them, or either of them, declare their business, or the purpose of their coming. That as soon as Mr. *Wilkes* was carried away, which was about noon, Mr. *Wood* and Mr. *Stanhope* came: That Mr. *Wood* asked Mr. *Watson*, "Have you locked up all the rooms where Mr. *Wilkes*'s papers are?" He answered "Yes; I have got the key of the study." That Mr. *Wood* and Mr. *Stanhope* then went into the parlour; the messengers continued waiting in the passage. That soon after Mr. *Webb* knocked at the door; upon it's being opened this witness attempted to stop him, but he rushed in. That Mr. *Wood* staid that time about half an hour; that when he went away he gave orders to the messengers, that no one should come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time several of Mr. *Wilkes*'s friends came, viz. *Humphry Cotes*, *Gardiner*, *Philips*, *Hopkins*, &c. and were denied admittance by the constable: That *Watson*, the messenger, upon being called upon by these gentlemen to produce his orders for refusing them admittance, said he had only a verbal order from Mr. *Wood*. That the messengers, however, did at last permit the gentlemen to come in.

That soon after Lord *Temple* came; that in a short time after Mr. *Wood* returned, and appeared to be very angry that

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that the gentlemen had been admitted, "Who let these men in?" That the messengers answered, "They would come in." Mr. *Wood* then asked, "Who would come in?" Mr. *Gardiner* answered, "'Twas I, Sir."

That soon after that Mr. *Wilkes's* friends went away; that Mr. *Wood* then called for a candle, which was brought him, and he and Mr. *Stanhope* then went up stairs, with *Mony* and *Blackmore*, the messengers, who appeared to take their orders from Mr. *Wood* and Mr. *Stanhope*. That they rummaged all the papers together they could find, in and about the room; that they (the messengers) fetched a sack, and filled it with the papers. That *Blackmore* then went down stairs, and fetched a smith to open the locks. That *Mann*, a messenger, then came, and would whisper Mr. *Wood*, who bade him speak out; he then said he brought orders [5] from Lord *Hallifax* to seize all manuscripts. That the smith then came, and, by the direction of *Blackmore*, the messenger, opened four locks of the lower drawers of a bureau; that they took out all the papers in those drawers and a pocket-book of Mr. *Wilkes's*, and put them all into the sack together, and then sealed up the sack. That this witness was present during all this time; that the messengers were obedient, and paid an entire regard to the directions of Mr. *Wood* and Mr. *Stanhope*. That when Mr. *Wood* went away it was near two o'clock in the afternoon; that Mr. *Wood*, upon the whole, might be near two hours and an half in Mr. *Wilkes's* house. That no kind of inventory was made of the papers which were put into the sack. That Mr. *Stanhope* appeared all along to be favourable, and frequently bade the messengers be cautious and careful.

Upon his being cross-examined, he said,

That Mr. *Wilkes* was carried away about noon.

That Mr. *Wilkes* went out in the morning about six, and returned home about nine o'clock.

That Mr. *Hopkins* had been there that morning before.

That Mr. *Wood* did absolutely and positively (this witness avers it) order, upon his going out, that all the doors should be locked up, particularly the street door: That Mr. *Wood* told the messengers they knew their orders, and bade them execute them. That he remembers Mr. *Stanhope* bid them be careful in rummaging, but don't recollect Mr. *Wood* said so. That *Chisholm*, the constable, held the sack, whilst the messengers filled it with papers.

That Mr. *Wood* was not there when the locks were opened:

ed: He now says, that Mr. *Wood* had before declared that the locks must be opened.

That Mr. *Stanhope* said, to be sure, the locks must be opened. That Mr. *Wood*, he now says, was at one time above an hour in Mr. *Wilkes's* study.

That Mr. *Stanhope* was there with Mr. *Wood* at the time the papers were carried away.

That Mr. *Webb* was gone away some time before.

[6] *Richard Schofield* says, that he is a livery servant to Mr. *Wilkes*: That he let Mr. *Wood* in at the door on the 30th of *April*, about eleven o'clock in the morning, as he thinks, to the best of his remembrance; that Mr. *Wood* staid the first time about a quarter of an hour. He confirms in general the last witness.

That *Wood* went away, and returned in about an hour.

That the messenger, upon being asked by Mr. *Gardiner* for his orders, said he had only verbal ones, from Mr. *Wood*.

That he can give no account of what passed up stairs, as he remained all that time in the passage below.

He confirms the last witness on that circumstance of the messenger, *Mann's*, coming from Lord *Hallifax*, with fresh orders.

That a post-letter came, in the mean time, directed to Mr. *Wilkes*, which the messenger, *Watson*, received, and would not deliver till Mr. *Wood* returned, who immediately delivered it, *unopened*, into this witness's hands.

That Mr. *Wood*, when he went away, ordered the doors to be kept fast locked, particularly the street door.

That *Blackmore* came down stairs, and asked this witness where Mr. *Wilkes's* smith lived, and he answered him he believed in *Cheapside*.

Upon his being cross-examined, he said,

That Mr. *Wood* came about a quarter of an hour after Mr. *Wilkes* was carried away to Lord *Hallifax*.

That Mr. *Wood*, Mr. *Stanhope*, the four messengers, with the constable, together with another gentleman, whom he did not know, were the persons who came into the house.

Humphry Cotes says, that he was at Mr. *Wilkes's* the 30th of *April* last, in the morning, about eleven o'clock, being sent for by Mr. *Wilkes*.

That Mr. *Wood* came in between twelve and one: That he (this witness) had been down to the court of Common Pleas, to apply for a *habeas corpus*, and, upon his return to Mr. *Wilkes's* house, was told that Mr. *Wilkes* was not at home,

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home, and that he, *Cotes*, must not come in; this was between twelve and one o'clock. He demanded the reason why he must not come in, and by whose authority the door was locked. The man at the door answered, by the secretary of state's.

The solicitor-general disputed this evidence, as Mr. *Cotes* [7] did not declare the man's name.

But *Cotes* then said, that the door-keeper called *Watson*, the messenger, to him; who said he had the secretary's verbal order only, but not a written one.

That this witness did then insist upon being admitted, and did accordingly enter the house.

That Mr. *Wood* presently after came in, and said, with anger, "What do these men do here!"

That this witness then said, "What business have you here, Sir?" Mr. *Wood* answered, that he was the secretary of state's secretary.

That this witness then said, he had nothing to do with the secretary of state, nor his secretary neither; that his name was *Humphry Cotes*, and was to be spoken with at any time.

That he (this witness) staid at Mr. *Wilkes's* house till past two o'clock.

That he was desired by Mr. *Wood* to be present when Mr. *Wilkes's* papers were sealed up, which he refused to do.

The solicitor-general did not cross-examine him.

Richard Hopkins, Esq; says, that he went to Mr. *Wilkes* on the 30th of *April* last, at half an hour past nine o'clock in the morning, and staid two hours; found then no kind of obstruction.

That Mr. *Wood* was not there at this time, as this witness verily believes; but that when he returned, Mr. *Wood* had been there.

Confirms the last witness's account, of the obstructions to his entering the house, at this his last coming. That he was desired to be present at the sealing up Mr. *Wilkes's* papers, which he declined doing.

Arthur Beardmore says, that he was in *Westminster-hall* on the 30th of *April* last, and, hearing of Mr. *Wilkes's* arrest, he went directly to his house, and, with some difficulty, gained admittance. That when he gained admittance, and came into the parlour, Mr. *Wood* was there, altercationing with the last witness, Mr. *Hopkins*.

That Mr. *Gardiner* and Mr. *Cotes* were then there. [8]

That Lord *Temple* was likewise there.

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'That he (this witness) observing much confusion, demanded of Mr. *Wood* to shew his authority, and that much wrangling then ensued. 'That Mr. *Wood* and Mr. *Webb* were both there at this time. 'That Mr. *Wood* intreated the company to believe, that the secretaries had acted entirely pursuant to the advice and direction of the attorney and solicitor generals; to which this witness answered, that he very much doubted it.

'That this witness, coming into the parlour again through the passage, saw Mr. *Webb* standing at the foot of the stairs, with some keys in his hand, which this witness did presume, and verily did believe, to be some of Mr. *Wilkes's* keys to his private scrutoires and drawers.

'That Mr. *Wood* did desire him (this witness) to be present at the sealing up Mr. *Wilkes's* papers, which he utterly refused to do.

'The council for the prosecution declined examining Mr. *Gardiner* and Mr. *Philips*, (who had both been present) on, account of their being employed in the cause; and therefore rest here.

'The solicitor-general then stood up to make the defence which he divided into two parts; and first, he maintained the plea of *Not guilty*; but if the jury should be of opinion that would not stand good, and that the evidence he should bring would not be capable of setting aside the evidence already produced in the court on the other side; he then, secondly, relied on the *special justification*. He was at a loss, he said, to understand what Mr. *Wilkes* meant by bringing an action against Mr. *Wood*, as he was neither the issuer of the warrant, nor the executioner of it. If the constitution had been in such an egregious manner attacked, why not bring the secretaries of state, themselves, into court? Why should Mr. *Wilkes* commence separate actions against each person? Is Mr. *Wilkes*, at any event, entitled to tenfold damages? This was the first time he ever knew a *private* action represented as the cause of all the good people of *England*. If the *constitution* has, in any instance, been violated, the *crown* must be the prosecutor, as it is in all *criminal* cases. The constitution does not consist in any one particular part of the law; the whole law is the constitution of the country, and a breach in one part of the law is as much a violation of the constitution as of another. Though so much has been said on the other side, with regard to the injury that might result from the promulgation of secrets, no proof had been brought of any thing being promulgated

promulgated that was not proper to be so. The arguments [9] which had been used against seizing of papers, to procure proof, were *felo de se*, unless the major was denied to include the minor. He then went upon the argument touching the warrant, and observed that these warrants had been issued as far back as the courts of justice could lead them. That the late act of parliament of *George the Second* for taking up vagrants was a *general search-warrant*, and he never knew it was ever esteemed an infringement of our constitution. That these warrants had existed *before, at, and since* the revolution, and had been till this case unimpeached; that if so contradictory to the constitution of this country, they could never have remained to this time.

He then made a general observation to the jury, that it was their duty to hear the cause coolly and dispassionately, without any bias to one side or the other. He then went on to make remarks on the evidence which had been given by the plaintiff; remarked that the question of liberty had nothing to do with the present cause, which only respected the seizure of papers. That the messengers went bunglingly about their business; *Mr. Wood* was only sent to see they did their duty.

He then went on to make remarks on the *North Briton*, No. 45. That it was a libel on the three branches of the legislative body, king, lords, and commons; that it was a libel of such a nature, that when it was before the two houses of parliament not one single person, in either house, ever uttered one single word in defence of it. That the whole of the *North Britons* were of such a nature, that it astonished most considerate persons how they should have passed so long unnoticed; that it had attacked private persons, persons in public stations, with their names written at full length; which had already produced bloodshed, in an instance which they all well knew: And what farther fatal consequences might result from those publications, who would be answerable! If *Mr. Wilkes* should be proved to be the author of these papers, and of that libel of libels, No. 45. (an equal to which he defied this or any other age to produce) if he should be proved to be the author of that paper, which he was confident he should be able to prove, to the full satisfaction of the court and jury; in that case, so far from thinking him worthy of *exemplary* damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and a sower of dissention amongst his majesty's subjects. He then observed,

served, that the *freedom* of this country consists, that there is *no man so high*, that he is *out of the reach of the law*, nor any man so low, that he is *beneath the protection of it*.

[10] That the warrant was legal in itself: That the authority of a secretary of state was sufficiently established. That damages should always be reckoned according to the *injury* received: A jury that ever acted on any other principles certainly forswore themselves.

Lord *Hallifax* then came into court, and being sworn, said, that he did receive information concerning No. 45.

That he did issue warrants in consequence of such information. That he did desire Mr. *Weston*, his secretary, to go to Mr. *Wilkes's*, and see that the messengers did their duty; that Mr. *Weston* declined it, beseeching his Lordship to excuse him, on account of his weak nerves, and ill state of health; that he then did desire Mr. *Wood* to go, who accordingly went. That he had reason to believe that Mr. *Wilkes* was the author of No. 45.

That he had information previous to the apprehending Mr. *Wilkes*, and his Lordship believes, to the best of his remembrance, it was on the very day the warrant was put in execution.

That this information tended to prove Mr. *Wilkes* the author of No. 45; but he cannot pretend to charge his memory with the entire contents of the information.

That orders were given by his Lordship to the messengers, but he declares that he cannot, at this time, pretend to recollect either their names or their persons. That these orders were given by his Lordship previous to the apprehension of Mr. *Wilkes*.

Upon the Lord Chief Justice expressing a desire to be informed by his Lordship concerning the nature of the information said to be received at his office, and about which his Lordship appeared rather shy, and cautious of entering upon, the solicitor-general then produced an affidavit of *Walter Balf*, a printer in the *Old Bailey*, which was read, in order to prove Mr. *Wilkes* the author of No. 45.

[I cannot recollect the whole of this affidavit, but it had in general a tendency to prove *Wilkes* the author and this *Balf* the printer of No. 45.]

Upon Lord *Hallifax's* being cross-examined, he said, that Mr. *Weston* is his own secretary, and that Mr. *Wood* was Lord *Egremont's* secretary.

His Lordship was asked, whether he should think himself then authorized to command the secretary of Lord *Egremont*

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Egremont to do any thing. After some hesitation, his Lordship answered, not without consulting Lord *Egremont*.

Said, that the offices are carried on in separate departments, but form only one complete secretary's office. He owns, however, that each secretary has the entire choosing and appointing his own officers. [11]

That the warrant for the apprehension of Mr. *Wilkes* was issued (as he calls it, which, being explained, signifies made out) on the 26th of *April* last, and the information he now fixes to have been received on the 29th of *April*, and the arresting *Wilkes's* person the 30th day of *April*.

N. B. His Lordship here fairly acknowledges that he issued the warrant three whole days before he received any information at all; and that during these three days the warrant lay dormant, whilst they were upon the hunt for intelligence.

The king's speech at the close of the last sessions of parliament was then read.

The *North Briton*, No. 45, was afterwards read.

Some strictures of the solicitor-general then ensued, upon the heinousness of the author's crime.

Thomas Caddell says, that he is apprentice to *Andrew Millar*, a bookseller in the *Strand*; that he is nearly out of his apprenticeship. That Mr. *Wilkes* called there in the summer of 1762, and left word with him; (this witness) that his master should advertise a new paper, shortly to come out, entitled the *North Briton*, and to be published by him (*Millar*): That his master did, in consequence, advertise it, and was paid by Mr. *Wilkes* the sum of one pound eight shillings, for advertisements.

[N. B. The receipt was produced in court.]

That his master did afterwards, upon considering the affair, decline publishing the *North Briton*; saying he would publish no political matters.

Serjeant *Glynn* then objected to their going into the evidence, to prove Mr. *Wilkes* the author of other papers, which had no respect to the paper in question; but

The Lord Chief Justice allowed it to be a good corroborating chain: But observed, if they failed in the last link, the whole would fall to the ground.

William Johnston says, that he is a bookseller in *Ludgate-street*. That Mr. *Wilkes* applied to him to publish the *North Briton*, previous to it's appearing: That Mr. *Wilkes* did explain to him the general design; that he said he must have [12]

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have a publisher who would not stand in fear of the censures of justice.

That he never met Mr. *Wilkes* any where on this account; but that Mr. *Wilkes* always came to him.

That he, (this witness) upon consideration of this matter, declined publishing the *North Briton*.

That Mr. *Wilkes* then desired him to recommend a publisher: That he recommended Mr. *Kearsey* to him.

That he (this witness) had a correspondence with Mr. *Wilkes*, concerning the *North Britons*, and revising them for the press; but that, after three or four numbers of the paper were published, he (this witness) did, upon considering the affair, decline that also.

Jonathan Scott says, that he knows Mr. *Wilkes's* hand-writing, and proves a number of letters shewn him to be Mr. *Wilkes's* hand-writing, viz.

No. 1,	dated <i>Westminster,</i>	26 July 1762.
2,	ditto,	29.
3,	ditto,	8 August.
4,	<i>Aylesbury,</i>	15.
5,	ditto,	25.
6,	<i>Great George-street,</i>	7 October.
7,	<i>Winchester,</i>	14.
8,	ditto,	31.
9,	<i>Great George-street,</i>	Friday Morning.
10,	ditto,	27 November.
11,	ditto,	12 December.
12,	ditto,	17.

All these were read; they are to *Kearsey*, and relate to *North Britons*, then sent to be published.

[N. B. Between twenty and thirty letters were produced, but these only were read.]

Walter Balf says, in the first place, that he is under a recognizance, and therefore prays he may be excused from answering any question which may tend to affect or injure himself.

[13] A debate ensued for near an hour, whether he may or may not be allowed the privilege.

The Solicitor-General very strenuously asserts, that in the present case he may not be allowed it.

Serjeant *Glynn*, and the Recorder, reply to him.

The

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The Lord Chief Justice gives it as his opinion, that the man is *not bound* to answer to any matter which may tend to *accuse himself*. *

Balff, then says, that he is a printer in the *Old Bailey*, and that he knows Mr. *Wilkes*.

Question—Did you receive this letter? One being shewn to him. Answer—Yes.

A letter of the 22d of *April* was then read of Mr. *Wilkes* to *Walter Balff*, which, from the purport of it, has a strong tendency to prove *Wilkes* the author of No. 45.

This letter of *Wilkes* refers to an inclosed paper (which paper does not appear) which he directs *Balff* to bring in, in the form of a letter, betwixt the conclusion of the next *North Briton*, and his proposals.

This letter likewise directs *Balff* to print the *North Briton* spoken of, in the compass of *two* sheets.

Charles Shaw says, that he is an apprentice to *Walter Balff* the last witness. That the *North Briton*, No. 45. was printed at his master's house. That he knows Mr. *Wilkes*, and has seen him often at his master's house, but that he does not know the business upon which he came there.

George Kearsley sworn, but not suffered to be examined, being under a prosecution at this time.

Michael Curry says, that he is a journeyman printer, that he was employed by Mr. *Wilkes* to work at the press in *Great George-street*; that Mr. *Wilkes* gave them the whole set of the *North Britons* to be printed, and called them at that time *his North Britons*.

The counsel for the prosecution objected to this last being a proper evidence at all to the questions; as Mr. *Wilkes* or any other person's *republicing* a work, against which there was no judicial determination, could never affect them, as the *original* author and publisher of it. [14]

They then went into the *legality* of the warrant, and many *precedents* of the same kinds of warrants were produced in court, to prove such warrants the constant uninterrupted course of the secretaries office from the revolution.

The warrants from Lord *Hallifax*, for apprehending the authors, printers and publishers of the *North Briton* No. 45. were likewise read.

Lowell Stanhope, Esq; says that he came to Mr. *Wilkes's* house immediately after he was carried away to Lord *Hallifax's*; that he went with Mr. *Wood*, and stayed there half an

an hour; that he was there but once, and stayed till the papers were sealed up; that he never went out of the study; that Mr. *Wood* was in the study but part of the time, and did nothing at all but observe what past; that he (Mr. *Wood*,) gave no orders to break locks by any kind of means, nor gave the messengers any orders or directions at all, but only bade them do their duty, and use civility!

That Mr. *Wood* was not in the room when the smith was sent for, nor gave any orders for that purpose, as Mr. *Stanhope* observed; that Mr. *Wood* was not present when the locks were opened.

But that it was *Blackmore*, the messenger, who broke open the locks, (in this circumstance Mr. *Stanhope* exactly confirms *Matthew Brown's* evidence.)

That Mr. *Wood* went to Mr. *Wilkes*, merely at the instance of Lord *Hallifax*, in order to enforce a due and proper obedience to, and execution of, the warrant, and to prevent the messengers from committing any blunders.

That a debate arising, whether a table with a locked drawer should be removed entire or be opened, Mr. *Mann* was sent to Lord *Hallifax* for directions, and brought word that the drawers must be opened.

Upon his being cross examined, said that the messengers were to take *manuscript papers* only, and not meddle with *improper* matters, such as *printed books, papers, &c.* That he did think it incumbent upon him (this witness) to see that all the *proper* papers should be removed.

[15]

Robert Chisholm says that he was the constable called upon to attend the messengers to Mr. *Wilkes*; that it was on the 30th of *April* last, at six o'clock in the morning, that he was called upon; that Mr. *Wood* came immediately after Mr. *Wilkes* was carried away; that he (this witness) heard Mr. *Wood* give no kind of orders at all; in short, that his opinion is, Mr. *Wood* only came to take care that the messengers did nothing that was wrong or improper.

Mr. *Dunning* asked this witness, whether he then imagined, that Mr. *Wood* appeared there merely on behalf of Mr. *Wilkes*, as his friend—he answered not so neither.

This witness shuffled and prevaricated very much, and contradicted his own evidence more than once.

Philip Carteret Webb, Esq; says that Mr. *Wood* was sent by the secretaries, merely to see that the messengers executed their warrants in due form and order; that he (this witness) was only once at Mr. *Wilkes's*, and then not more than half an hour; that he went because the secretary of
state

state was uneasy, and anxious to know what was doing at Mr. *Wilkes's*; that he (this witness) was never up stairs at Mr. *Wilkes's*; that he had a conversation with Lord *Temple* in the parlour. That he denies he had ever any keys of Mr. *Wilkes* in his hands; that he verily believes he had *no* keys at all in his hands; but that if he had any, they were his *own* and not Mr. *Wilkes's*.

Upon being cross-examined by Mr. *Dunning*, *Philip Carteret Webb* then said, that upon recollection he was absolutely certain, that he had *no* keys at that time in his hands.

That Mr. *Weston* was desired by Lord *Hallifax* to go, but that he excused himself on account of his weak nerves, and ill state of health, and that upon his (Mr. *Weston*) declining it Mr. *Wood* was desired by my Lord to go, which he accordingly did.

Richard Watson says he is a king's messenger, that he was at Mr. *Wilkes's* on the 30th of *April* last, that Mr. *Wood* was there and did nothing at all as this witness observed, but only gave them directions how to act.

The Solicitor-General observed, when *Balff* and *Kearfley's* evidence were set aside, that he placed little dependence on their evidence, as to the proof of Mr. *Wilkes* being the author of No. 45, and indeed he said it was not very material, for that the letter from Mr. *Wilkes* to *Balff* the printer which had been read, see page 26, and which he then held in his hand, was conclusive evidence against him. *Norton* expatiated long upon the circumstance of [16] this letter: He observed that it was a lucky circumstance for them that No. 45 was the only number of the *North Briton* which was printed on two sheets of paper, that it was the only number that had a letter at the end of it, with the proposals following. He enlarged very fully on all these corresponding circumstances.

Lord Chief Justice *Pratt* asked for the letter which was enclosed, that he might compare it with the letter at the end of the *North Briton*, No. 45.

But the Solicitor-General answered, he had it not.

Serjeant *Glynn* in his reply observed, that the manner of defence that had been set up would necessarily make his reply longer than it otherwise would have been. What he had to remark he should divide under two heads, 1st, as to the defence which had been set up of *not guilty*; and 2dly, make observations on the *special justification* that had been pleaded.

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The evidence proved, uncontroverted, that Mr. *Wood* was the prime actor in the whole affair. He then observed that the three witnesses on the side of the defendant gave different evidences of the business Mr. *Wood* came about : Mr. *Philip Carteret Webb's* account was quite inconsistent : Was it possible to suppose that a man of Mr. *Wood's* character and known abilities should be sent only with a message that any menial servant could have delivered as well ; and that he should have nothing else to do with the affair. He then observed that all the witnesses called to oppose the evidence of their side were *all* parties, and against whom prosecutions of a like nature were at present depending. He then went upon the point of *justification*, and observed, that as to Mr. *Wilkes* being the author of No. 45, they had totally failed in any kind of proof whatsoever ; or if they had produced the appearance of a proof, it was quite aside to the present question, and to which he should not at any event have made any reply, as there was at present depending a prosecution, as to that particular point, in his defence of which he made no doubt he should be able fully to prove, that Mr. *Wilkes* was not the author.—That Mr. *Wilkes* could not be supposed or even suspected of any design against the present establishment ; that he was educated in and had always adopted whig principles ; that he was known to be attached to and to have the highest opinion of the present prince on the throne, which he had often and upon many occasions declared ; and his conduct had always been answerable to these declarations. When crimes have been exaggerated, and so much declamation made use of as there has been on the present occasion, one would naturally have expected that some proof would have followed ; but that in reality could never have been the case, as the sole

[17] design was to blacken Mr. *Wilkes's* character, without any foundation in fact. He then observed that various hands were commonly employed in most periodical works ; that Mr. *Wilkes* was not denied to be the author of some of the *North Britons* ; but that it was not likely he was the author of No. 45, and that indeed the republication of the work in volumes, in which was No. 45, so far from being a presumption against him, certainly affords the strongest reason to think he was not the author ; for if he had been so, it is not likely he would have been concerned in a publication, whilst a criminal process was depending. He then observed as to the warrant, that it was destitute of those things necessary to make it legal : That a *previous information* was, *always*

ways necessary. That the defendants had nothing to entitle them to a verdict; that the evidence they had set up was perfectly declamatory and unfair: Possibly Mr. Solicitor-General's office, might demand from him what he had said; but that he was well satisfied, from that gentleman's known good character and great abilities, that he would have refused to plead in a cause of a similar nature, which he was not forced to do *ex officio*. He was satisfied the jury would not view Mr. *Wilkes* as not entitled to a verdict, because loaded with calumny: That the case was a wound given to the constitution, and demanded damages accordingly: That Mr. *Wilkes's* papers had undergone the inspection of very improper persons to examine his private concerns, and called for an increase of damages on that score. The evidence brought of *precedents* of these kind of warrants only shew how *easy* things may creep into our *constitution*, *subversive* of its very *foundation*. He then closed with telling the jury he made no doubt, but they would find a verdict for the plaintiff, with large and exemplary damages.

The *Lord Chief Justice* then summoned up the evidence of the whole, and observed it was an action of trespass, to which the defendant had pleaded first not guilty, and then a special justification. He then went through the particulars relating to the justification, the king's speech, the libel No. 45.

Information given, that such a libel was published,

Lord *Hallifax* granting a warrant; messengers entering Mr. *Wilkes's* house; Mr. *Wood* directed to go thither only with a message, and remaining altogether inactive in the affair.

If the jury should be of opinion, that every step was *properly* taken as represented in the justification, and should esteem it fully proved, they must find a verdict for the defendant. But if on the other hand they should view Mr. *Wood* as a party in the affair, they must find a verdict for the plaintiff, with damages. This was a general direction his Lordship gave the jury, and he then went into the *particulars* of the evidence. The chief part of the *justification*, he observed, consisted in proving Mr. *Wilkes* the *author*, and the evidence given, together with the letters to *Kearseley* plainly shew, that Mr. *Wilkes* was *generally* so. Then as to No. 45, the evidence was of two sorts, first a letter to fix it upon him, and the other general: As to the proof of the republication of the *North Britons* given by *Currie*, supposing it of itself sufficient, of which there was a doubt, it did not extend to the present case, to justify a warrant issued

issued several weeks *previous* to that period. As to the letter, the gentlemen must take that out with them, together with the *North Briton*, No. 45, and allow all the weight to the circumstance they think it will admit of.

If upon the whole they should esteem Mr. *Wilkes* to be the *author* and *publisher*, the justification would be fully proved. But that, to do this, it was essentially necessary to have the enclosed paper in the letter to *Balf*, as, without that, all the rest was but *inference*, and not the proof *positive* which the law required. As to Mr. *Wood*, he was described on one side as very active in the affair, and on the other side as quite inoffensive. *Aiders* and *abettors* are always esteemed *parties*: but if a person present remains only a spectator, he cannot be affected. The evidence on the one side had been positive, and on the other side only negative. Mr. *Wood* might have said and done as represented on the one side, when the evidences on the other side were not present: If upon the *whole* they should be of opinion, that Mr. *Wood* was active in the affair, they must find a verdict for the *plaintiff* with damages. His lordship then went upon the warrant, which he declared was a point of the *greatest consequence* he had ever met with in his whole practice. The defendants claimed a right, under *precedents*, to force persons houses, break open escrutores, seize their papers, &c. upon a *general* warrant, where no inventory is made of the things thus taken away, and where *no offenders names are specified in the warrant*, and therefore a *discretionary* power given to *messengers* to search wherever their *suspicions* may chance to fall. If such a power is *truly* invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is *totally subversive* of the *liberty* of the *subject*.

And as for the *precedents*, will that be esteemed law in a secretary of state which is *not* law in *any* other magistrate of this kingdom? If they should be found to be *legal*, they are certainly of the most dangerous consequences; if *not legal*, must aggravate damages. Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for *more* than the *injury* received. *Damages* are designed not only as a *satisfaction* to the *injured* person, but likewise as a *punishment* to the *guilty*, to *deter* from any such
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Michaelmas Term, 3 Geo. 3. C. B.

proceeding for the future, and as a proof of the *detestation* of the jury to the *action* itself. †

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the *office precedents*, which had been produced since the revolution, are *no* justification of a practice in *itself* illegal, and *contrary* to the *fundamental principles* of the *constitution*; though its having been the *constant practice* of the office, might fairly be pleaded in *mitigation* of damages. *

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. *Wilkes* the author or publisher of No. 45, it will be filed, and stand upon record in the court of Common Pleas, and of course be produced as proof, upon the criminal cause depending, in barr of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to *do justice*, according to the evidence; he therefore left it to the *irconsideration*.

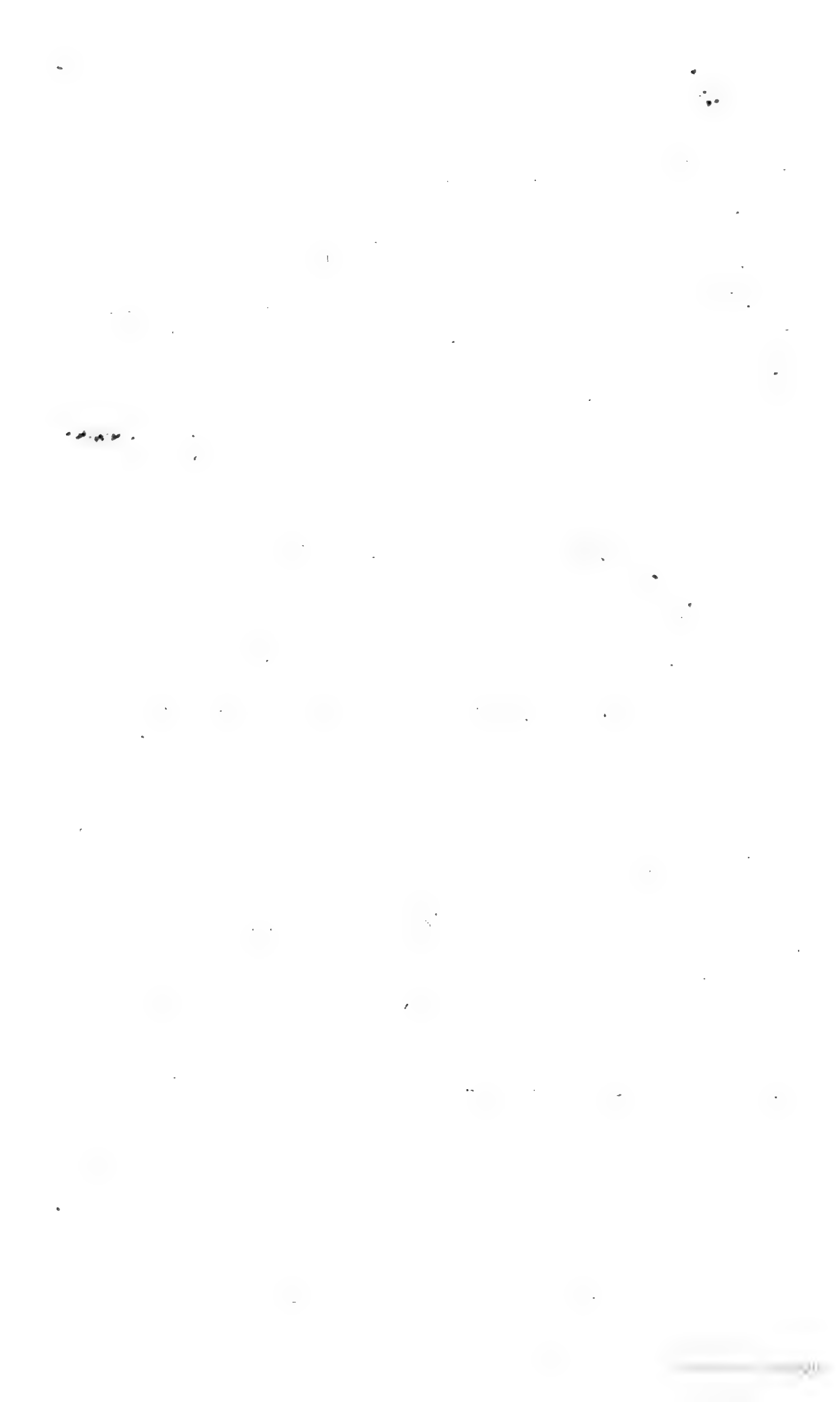
The jury, after withdrawing for near half an hour, returned, and found a *general verdict* upon both issues for the *plaintiff*, with a *thousand pounds* damages.

After the verdict was recorded, the Solicitor-General offered to prefer a *bill* of *exceptions*, which the Lord Chief Justice refused to accept, saying it was out of time.

The court sat at nine o'clock in the morning, and the verdict was brought in at twenty minutes past eleven o'clock at night.

† Vita reipublicæ pax, et animi libertas et libertatis, firmissimum propugnaculum sua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat, Judicandum est legibus non exemplis.



*Sir James Burrow's Reports end at This Term
See his advertisement at the end of the 5th vol.
of his Reports.*

Easter Term,

12 Geo. 3. 1772. K. B.

Somerfet against Stewart.

MAY 14, 1772.

*1 Bl. Com. 127
Curran in Rowan's trial
19 How. U. S. R. 534. 535
2 B. Hresw. 448*

ON return to an *habeas corpus*, requiring Captain Knowles *2 O State trials 1.*
to shew cause for the seizure and detainure of the
complainant *Somerfet*, a negro—The case appeared to be
this—

That the negro had been a slave to Mr. *Stewart*, in *Virginia*, had been purchased from the *African* coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to *England* by his master, who intending to return, by force sent him on board of Captain *Knowles's* vessel, lying in the river; and was there, by the order of his master, in the custody of Captain *Knowles*, detained against his consent; until returned in obedience to the writ. And under this order, and the facts stated, Captain *Knowles* relied in his justification.

Upon the second argument, (Serjeant *Glynn* was in the first, and, I think, Mr. *Mansfield*) the pleading on behalf of the negro was opened by Mr. *Hargrave*. I need not say that it will be found at large, and I presume has been read by most of the profession, he having obliged the public with it himself: But I hope this summary note, which I took of it at the time, will not be thought impertinent; as it is not easy for a cause in which that gentleman has appeared, not to be materially injured by a total omission of his share in it.

Mr. *Hargrave*.

The importance of the question will I hope justify to your lordships the solicitude with which I rise to defend it; and however unequal I feel myself, will command attention. I trust, indeed, this is a cause sufficient to support my own

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unworthiness

[2] unworthiness by it's single intrinsic merit. I shall endeavour to state the grounds from which Mr. Stewart's supposed right arises; and then offer, as appears to me, sufficient confutation to his claim over the negro, as property, after having him brought over to *England*; (an absolute and unlimited property, or as right accruing from contract;) Mr. Stewart insists on the former. The question on that is not whether slavery is lawful in the colonies, (where a concurrence of unhappy circumstances has caused it to be established as necessary;) but whether in *England*? Not whether it ever has existed in *England*; but whether it be not now abolished? Various definitions have been given of slavery: One of the most considerable is the following; a service for life, for bare necessities. Harsh and terrible to human nature as even such a condition is, slavery is very insufficiently defined by these circumstances—it includes not the power of the master over the slave's person, property, and limbs, life only excepted; it includes not the right over all acquirements of the slave's labour; nor includes the alienation of the unhappy object from his original master, to whatever absolute lord, interest, caprice or malice, may chuse to transfer him; it includes not the descendible property from father to son, and in like manner continually of the slave and all his descendants. Let us reflect on the consequences of servitude in a light still more important. The corruption of manners in the master, from the entire subjection of the slaves he possesses to his sole will; from whence spring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train; the danger to the master, from the revenge of his much injured and unredressed dependant; debasement of the mind of the slave, for want of means and motives of improvement; and peril to the constitution under which the slave cannot but suffer, and which he will naturally endeavour to subvert, as the only means of retrieving comfort and security to himself.—The humanity of modern times has much mitigated this extreme rigour of slavery; shall an attempt to introduce perpetual servitude here to this island hope for countenance? Will not all the other mischiefs of mere utter servitude revive, if once the idea of absolute property, under the immediate sanction of the laws of this country, extend itself to those who have been brought over to a soil whose air is deemed too pure for slaves to breathe in it; but the laws, the genius and spirit of the constitution, forbid the approach of slavery; will not suffer it's existence here. This point, I conceive, needs no further enlargement:

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enlargement: I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices. But it has been said by great authorities, though slavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government, yet a moderate servitude may be tolerated; nay, sometimes must be maintained. Captivity in war is the principal ground of slavery: Contract another. *Grotius de J. B. & P.* and *Pufendorf*, b. 6. c. 3. § 5. approves of making slaves of captives in war. The author of the Spirit of Laws denies, except for self-preservation, and then only a temporary slavery. Dr. *Rutherford*, in his Principles of Natural Law, and *Locke*, absolutely against it. As to contract; want of sufficient consideration justly gives full exception to the considering of it as contract. If it cannot be supported against parents, certainly not against children. Slavery imposed for the performance of public works for civil crimes, is much more defensible, and rests on quite different foundations. Domestic slavery, the object of the present consideration, is now submitted to observation in the ensuing account, its first commencement, progress, and gradual decrease: It took origin very early among the barbarous nations, continued in the state of the *Jews*, *Greeks*, *Romans*, and *Germans*; was propagated by the last over the numerous and extensive countries they subdued. Incompatible with the mild and humane precepts of christianity, it began to be abolished in *Spain*, as the inhabitants grew enlightened and civilized, in the 8th century; its decay extended over *Europe* in the 4th; was pretty well perfected in the beginning of the 16th century. Soon after that period, the discovery of *America* revived those tyrannic doctrines of servitude, with their wretched consequences. There is now at last an attempt, and the first yet known, to introduce it into *England*; long and uninterrupted usage from the origin of the common law, stands to oppose its revival. All kinds of domestic slavery were prohibited, except villenage. The villain was bound indeed to perpetual service; liable to the arbitrary disposal of his lord. There were two sorts; villain regardant, and in gross: The former as belonging to a manor, to the lord of which his ancestors had done villain service; in gross, when a villain was granted over by the lord. Villains were originally captives at the conquest, or troubles before. Villenage could commence no where but in *England*, it was necessary to have prescription for it. A new species has never arisen

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till now ; for had it, remedies and powers there would have been at law : Therefore the most violent presumption against is the silence of the laws, were there nothing more. 'Tis very doubtful whether the laws of *England* will permit a man to bind himself by contract to serve for life : Certainly will not suffer him to invest another man with despotism, nor prevent his own right to dispose of property. If disallowed by consent of parties, much more when by force ; if made void when commenced here, much more when imported. If these are true arguments, they reach the King himself as well as the subject. Dr. *Rutherford* says, if the civil law of any nation does not allow of slavery, prisoners of war cannot be made slaves. If the policy of our laws admits not of slavery, neither fact nor reason are for it. A man, it is said, told the judges of the Star-Chamber, in the case of a *Russian* slave whom they had ordered to be scourged and imprisoned, that the air of *England* was too pure for slavery. The parliament afterwards punished the judges of the Star-Chamber for such usage of the

[4] *Russian*, on his refusing to answer interrogatories. There are very few instances, few indeed, of decisions as to slaves, in this country. Two in *Charles* the 2d. where it was adjudged *trover* would lie. *Chamberlayne* and *Perrin*, *Will.* 3d. *trover* brought for taking a negro slave, adjudged it would not lie.—4th *Ann.* action of *trover*; judgment by default: On arrest of judgment, resolved that *trover* would not lie. Such the determinations in all but two cases ; and those the earliest, and disallowed by the subsequent decisions. Lord *Holt*—As soon as a slave enters *England* he becomes free. *Stanley* and *Harvey*, on a bequest to a slave ; by a person whom he had served some years by his former master's permission, the master claims the bequest ; Lord *Northington* decides for the slave, and gives him costs. 29th of *George* the 2d. c. 31, implies permission in *America*, unhappily thought necessary ; but the same reason subsists not here in *England*. The local law to be admitted when no very great inconvenience would follow ; but otherwise not. The right of the master depends on the condition of slavery (such as it is) in *America*. If the slave be brought hither, it has nothing left to depend on but a supposed contract of the slave to return ; which yet the law of *England* cannot permit. Thus has been traced the only mode of slavery ever been established here, villenage, long expired ; I hope it has shewn, the introducing new kinds of slavery has been cautiously, and, we trust, effectually guarded against by the same laws.

Your

Your lordships will indulge me in reciting the practice of foreign nations. 'Tis discountenanced in *France*; *Bartholinus de Republicâ* denies its permission by the law of *France*. *Molinus* gives a remarkable instance of the slave of an ambassador of *Spain* brought into *France*: He claims liberty; his claim allowed. *France* even mitigates the ancient slavery, far from creating new. *France* does not suffer even her King to introduce a new species of slavery. The other parliaments did indeed; but the parliament of *Paris*, considering the edict to import slavery as an exertion of the sovereign to the breach of the constitution, would not register that edict. Edict 1685, permits slavery in the colonies. Edict in 1716, recites the necessity to permit in *France*, but under various restraints, accurately enumerated in the Institute of *French* Laws. 1759 Admiralty court of *France*; *Causés Celebrées*, title *Negro*. A *French* gentleman purchased a slave, and sent him to *St. Malo's* entrusted with a friend: He came afterwards, and took him to *Paris*. After ten years the servant chuses to leave *France*. The master not like Mr. *Stewart* hurries him back by main force, but obtains a process to apprehend him, from a court of justice. While in prison, the servant institutes a process against his master, and is declared free. After the permission of slaves in the colonies, the edict of 1716 was necessary, to transfer that slavery to *Paris*; not without many restraints, as before remarked; otherwise the ancient principles would have prevailed. The author *De Jure Novissimo*, though the natural tendency of his book, as appears by the title, leads the other way, concurs with diverse great authorities, in reprobating the introduction of [5] a new species of servitude. In *England*, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, *Virginia*, or of a barbarous nation, *Africa*, prevail? From the submission of the negro to the laws of *England*, he is liable to all their penalties, and consequently has a right to their protection. There is one case I must still mention; some criminals having escaped execution in *Spain*, were set free in *France*. [Lord *Mansfield*—Rightly: for the laws of one country have not whereby to condemn offences supposed to be committed against those of another.]

An objection has arisen, that the *West India* company, with their trade in slaves, having been established by the law of *England*, its consequences must be recognized by that

that law; but the establishment is local, and these consequences local; and not the law of *England*, but the law of the Plantations.

The law of *Scotland* annuls the contract to serve for life; except in the case of colliers, and one other instance of a similar nature. A case is to be found in the History of the Decisions, where a term of years was discharged, as exceeding the usual limits of human life. At least, if contrary to all these decisions, the court should incline to think Mr. *Stewart* has a title, it must be by presumption of contract, there being no deed in evidence: on this supposition, Mr. *Stewart* was obliged, undoubtedly, to apply to a court of justice. Was it not sufficient, that without form, without written testimony, without even probability of a parol contract, he should venture to pretend to a right over the person and property of the negro, emancipated, as we contend, by his arrival hither, at a vast distance from his native country, while he vainly indulged the natural expectation of enjoying liberty, where there was no man who did not enjoy it? Was not this sufficient, but he must still proceed, seize the unoffending victim, with no other legal pretence for such a mode of arrest, but the taking an ill advantage of some inaccurate expressions in the *Habeas Corpus* Act; and thus pervert an establishment designed for the perfecting of freedom? I trust, an exception from a single clause, inadvertently worded, (as I must take the liberty to remark again) of that one statute, will not be allowed to over-rule the law of *England*. I cannot leave the court, without some excuse for the confusion in which I rose, and in which I now appear: For the anxiety and apprehension I have expressed, and deeply felt. It did not arise from want of consideration, for I have considered this cause for months, I may say years; much less did it spring from a doubt, how the cause might recommend itself to the candour and wisdom of the court. But I felt myself over-powered by the weight of the question. I now in full conviction how opposite to natural justice Mr. *Stewart's* claim is, in firm persuasion of its inconsistency with the laws of *England*, submit it cheerfully to the judgment of this honourable court: And hope as much honour to your lordships from the exclusion of this new slavery, as our ancestors obtained by the abolition of the old.

Mr. *Alleyne*—Though it may seem presumption in me to offer any remarks, after the elaborate discourse but now delivered, yet I hope the indulgence of the court; and shall confine my observations to some few points, not included by

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by Mr. *Hargrave*. 'Tis well known to your lordships, that much has been asserted by the ancient philosophers and civilians, in defence of the principles of slavery: *Aristotle* has particularly enlarged on that subject. An observation still it is, of one of the most able, most ingenious, most convincing writers of modern times, whom I need not hesitate, on this occasion, to prefer to *Aristotle*, the great *Montesquieu*, that *Aristotle*, on this subject, reasoned very unlike the philosopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his sword's point, spares him, and says therefore he has power over his life and liberty, is this true? By whatever duty he was bound to spare him in battle, (which he always is, when he can with safety) by the same he obliges himself to, spare the life of the captive, and restore his liberty as soon as possible, consistent with those considerations from whence, he was authorised to spare him at first; the same indispensable duty operates throughout. As a contract: In all contracts there must be power on one side to give, on the other to receive; and a competent consideration. Now, what power can there be in any man to dispose of all the rights vested by nature and society in him and his descendants? He cannot consent to part with them, without ceasing to be a man; for they immediately flow from, and are essential to, his condition as such: They cannot be taken from him, for they are not his, as a citizen or a member of society merely; and are not to be resigned to a power inferior to that which gave them. With respect to consideration, what shall be adequate? As a speculative point, slavery may a little differ in its appearance, and the relation of master and slave, with the obligations on the part of the slave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But slavery is not a natural, 'tis a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such municipal regulations do not subsist. The negro making choice of his habitation here, has subjected himself to the penalties, and is therefore entitled to the protection of our laws. One remarkable case seems to require being mentioned: Some *Spanish* criminals having escaped from execution, were set free in *France*. [Lord *Mansfield*—Note the distinction in the case: In this case,

France

[7] *France* was not bound to judge by the municipal laws of *Spain*; nor was to take cognizance of the offences supposed against that law.] There has been started an objection, that a company having been established by our government for the trade of slaves, it were unjust to deprive them here.—No: The government incorporated them with such powers as individuals had used by custom, the only title on which that trade subsisted; I conceive, that had never extended, nor could extend, to slaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of its authority. 'Tis said, let slaves know they are all free as soon as they arrive here, they will flock over in vast numbers, over-run this country, and desolate the plantations. There are too strong penalties by which they will be kept in; nor are the persons who convey them over much induced to attempt it; the despicable condition in which negroes have the misfortune to be considered, effectually prevents their importation in any considerable degree. Ought we not, on our part, to guard and preserve that liberty by which we are distinguished by all the earth! to be jealous of whatever measure has a tendency to diminish the veneration due to the first of blessings? The horrid cruelties, scarce credible in recital, perpetrated in *America*, might, by the allowance of slaves amongst us, be introduced here. Could your lordship, could any liberal and ingenuous temper indure, in the fields bordering on this city, to see a wretch bound for some trivial offence to a tree, torn and agonizing beneath the scourge? Such objects might by time become familiar, become unheeded by this nation; exercised, as they are now, to far different sentiments, may those sentiments never be extinct! the feelings of humanity! the generous sallies of free minds! May such principles never be corrupted by the mixture of slavish customs! Nor can I believe, we shall suffer any individual living here to want that liberty, whose effects are glory and happiness to the public and every individual.

Mr. *Wallace*—The question has been stated, whether the right can be supported here; or, if it can, whether a course of proceedings at law be not necessary to give effect to the right? 'Tis found in three quarters of the globe, and in part of the fourth. In *Asia* the whole people; in *Africa* and *America* far the greater part; in *Europe* great numbers of the *Russians* and *Polanders*. As to captivity in war, the Christian princes have been used to give life to the prisoners; and it took rise probably in the *Crusades*, when they gave them

them life, and sometimes franchised them, to enlist under the standard of the cross, against the *Mahometans*. The right of a conqueror was absolute in *Europe*, and is in *Africa*. The natives are brought from *Africa* to the *West Indies*; purchase is made there, not because of positive law, but there being no law against it. It cannot be in consideration by this or any other court, to see, whether the *West India* regulations are the best possible; such as they are, [8] while they continue in force as laws, they must be adhered to. As to *England*, not permitting slavery, there is no law against it; nor do I find any attempt has been made to prove the existence of one. Villenage itself has all but the name. Though the dissolution of monasteries, amongst other material alterations, did occasion the decay of that tenure, slaves could breathe in *England*: For villains were in this country, and were mere slaves, in *Elizabeth*. *Shepard's* Abridgment, afterwards, says they were worn out in his time. [Lord *Mansfield* mentions an assertion, but does not recollect the author, that two only were in *England* in the time of *Charles* the 2d. at the time of the abolition of tenures.] In the cases cited, the two first directly affirm an action of *trover*, an action appropriated to mere common chattels. Lord *Holt's* opinion, is a mere *dictum*, a decision unsupported by precedent. And if it be objected, that a proper action could not be brought, 'tis a known and allowed practice in mercantile transactions, if the cause arises abroad, to lay it within the kingdom: Therefore the contract in *Virginia* might be laid to be in *London*, and would not be traversable. With respect to the other cases, the particular mode of action was alone objected to; had it been an action *per quod servitium amisit*, for the loss of service, the court would have allowed it. The court called the person, for the recovery of whom it was brought, a slavish servant, in *Chamberlayne's* case. Lord *Hardwicke*, and the afterwards Lord Chief Justice *Talbot*, then Attorney and Solicitor-General, pronounced a slave not free by coming into *England*. 'Tis necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel. Therefore, the benefit taken on the *Habeas Corpus* Act ought to be allowed.

Lord *Mansfield* observes, The case alluded to was upon a petition in *Lincoln's Inn Hall*, after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy. The principal

principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not. 'Tis remarkable, tho' the *English* took infinite pains before to prevent their slaves being made Christians, that they might not be freed, the *French* suggested they must bring their's into *France*, (when the edict of 1706 was petitioned for,) to make them Christians. He said, the distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery, in its full extent, could not be tolerated here. Much consideration was necessary, to define how far the point should be carried. The court must consider the great detriment to proprietors, there being so great a number in the ports of this kingdom, that many thousands of pounds would be lost to the owners, by setting them free. (A gentleman observed, no great danger; for in a whole fleet, usually, there would not be six slaves.) As to *France*, the case stated decides no farther than that kingdom; and there freedom was claimed, because the slave had not been registered in the port where he entered, conformably to the edict of 1706. Might not a slave as well be freed by going out of *Virginia* to the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient? A statute by the legislature, to subject the *West India* property to payment of debts, I hope, will be thought some proof; another act divests the *African* Company of their slaves, and vests them in the *West India* Company: I say, I hope, these are proofs the law has interfered for the maintenance of the trade in slaves, and the transferring of slavery. As for want of application properly to a court of justice; a common servant may be corrected here by his master's private authority. *Habeas corpus* acknowledges a right to seize persons by force employed to serve abroad. A right of compulsion there must be, or the master will be under the ridiculous necessity of neglecting his proper business, by staying here to have their service, or must be quite deprived of those slaves he has been obliged to bring over. The case, as to service for life was not allowed, merely for want of a deed to pass it.

The court approved Mr. *Alleyne's* opinion of the distinction, how far municipal laws were to be regarded: Instanced the right of marriage; which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various; and

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and advised, if the merchants thought it so necessary, to apply to parliament, who could make laws.

Adjourned till that day se'night.

Mr. *Duntz*—'Tis incumbent on me to justify Captain *Knowles's* detainer of the negro; this will be effected, by proving a right in Mr. *Stewart*; even a supposed one: For till the matter was determined, it were somewhat unaccountable that a negro should depart his service, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. *Stewart's* claim. Before the writ of *habeas corpus* issued in the present case, there was, and there still is, a great number of slaves in *Africa*, (from whence the *American* plantations are supplied) who are saleable, and in fact sold. Under all these descriptions is *James Somerset*. Mr. *Stewart* brought him over to *England*; purposing to return to *Jamaica*, the negro chose to depart the service, and was stopt and detained by Captain *Knowles*, 'till his master should set sail and take him away to be sold in *Jamaica*. The gentlemen on the other side, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propositions; part of which are undeniably true, and part (as is usual in compositions of ingenuity) very disputable. 'Tis my misfortune to address an audience, the greater part of which, I fear, [10] are prejudiced the other way. But wishes, I am well convinced, will never enter into your lordships minds, to influence the determination of the point: This cause must be what in fact and law it is; it's fate, I trust, therefore, depends on fixt invariable rules, resulting by law from the nature of the case. For myself, I would not be understood to intimate a wish in favour of slavery, by any means; nor on the other side, to be supposed maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain those arguments which are most useful to Captain *Knowles*, as far as is consistent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indispensable duty to support it. I ask no other attention than may naturally result from the importance of the question: Less than this I have no reason to expect; more, I neither demand nor wish to have allowed. Many alarming apprehensions have been entertained of the consequence of the decision, either way. About 14,000 slaves, from the most exact intelligence I am able to procure are at present here; and some little time past, 166,914

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in *Jamaica*: there are, besides, a number of wild negroes in the woods. The computed value of a negro in those parts 50 *l.* a head. In the other islands I cannot state with the same accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almost brings over a great number; and will, be the decision on which side it may. Most negroes who have money (and that description I believe will include nearly all) make interest with the common sailors to be carried hither-to. There are negroes not falling under the proper denomination of any yet mentioned, descendants of the original slaves, the aborigines, if I may call them so; these have gradually acquired a natural attachment to their country and situation; in all insurrections they side with their masters: Otherwise, the vast disproportion of the negroes to the whites, (not less probably than that of 100 to one) would have been fatal in it's consequences. There are very strong and particular grounds of apprehension, if the relation in which they stand to their masters is utterly to be dissolved on the instant of their coming into *England*. Slavery, say the gentlemen, is an odious thing; the name is: And the reality; if it were as one has defined, and the rest supposed it. If it were necessary to the idea and the existence of *James Somerset*, that his master, even here, might kill, nay, might eat him, might sell living or dead, might make him and his descendants property alienable, and thus transmissible to posterity; this, how high soever my ideas may be of the duty of my profession, is what I should decline pretty much to defend or assert, for any purpose, seriously; I should only speak of it to testify my contempt and abhorrence. But this is what at present I am not at all concerned in; unless Captain *Knowles*, or Mr. *Stewart*, have killed or eat him. Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some

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at all times, and in all places at different times, has been restrained: Nor could society otherwise be conceived to exist. For the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is altered to the doing what one ought. The gentlemen who have spoke with so much zeal. have supposed different ways by which slavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power against which they combate. We are apt (and great authorities support this way of speaking)

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to call those nations universally, whose internal police we are ignorant of, barbarians; (thus the *Greeks*, particularly, stiled many nations, whose customs, generally considered, were far more justifiable and commendable than their own:) Unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly. There are slaves in *Africa* by captivity in war, but the number far from great; the country is divided into many small, some great territories, who do, in their wars with one another, use this custom. There are of these people, men who have a sense of the right and value of freedom; but who imagine that offences against society are punishable justly by the severe law of servitude. For crimes against property, a considerable addition is made to the number of slaves. They have a process by which the quantity of the debt is ascertained; and if all the property of the debtor in goods and chattels is insufficient, he who has thus dissipated all he has besides, is deemed property himself; the proper officer (sheriff we may call him) seizes the insolvent, and disposes of him as a slave. We don't contend under which of these the unfortunate man in question is; but his condition was that of servitude in *Africa*; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the *British* legislature confirm this condition; and thus he was a slave both in law and fact. I do not aim at proving these points; not because they want evidence, but because they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. *Stewart*, with this right, crossed the *Atlantic*, and was not to have the satisfaction of discovering, till after his arrival in this country, that all relation between him and the negro, as master and servant, was to be matter of controversy, and of long legal disquisition. A few words may be proper, concerning the *Russian* slave, and the proceedings of the House of Commons on that case. 'Tis not absurd in the idea, as quoted, nor improbable as matter of fact; the expression has a kind of absurdity. I think, without any prejudice to Mr. *Stewart*, or be merits of this cause, I may admit the utmost possible to be desired, as far as the case of that slave goes. The master and slave were both, (or should have been at least) on their coming here, new creatures. *Russian* slavery, and even the subordination amongst themselves, in the degree they use it, is not here to be tolerated. Mr. *Alleyne* justly observes, the municipal regula-

[12] regulations of one country are not binding on another; but does the relation cease where the modes of creating it, the degrees in which it subsists, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of master and servant ceases here? I understand the municipal relations differ in different colonies, according to humanity, and otherwise. A distinction was endeavoured to be established between natural and municipal relations; but the natural relations are not those only which attend the person of the man, political do so too; with which the municipal are most closely connected: Municipal laws, strictly, are those confined to a particular place; political, are those in which the municipal laws of many states may and do concur. The relation of husband and wife, I think myself warranted in questioning, as a natural relation: Does it subsist for life; or to answer the natural purposes which may reasonably be supposed often to terminate sooner? Yet this is one of those relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the same country at different periods; the political relation itself continuing usually unchanged by the change of place. There is but one form at present with us, by which the relation of husband and wife can be constituted; there was a time when otherwise: I need not say other nations have their own modes, for that and other ends of society. Contract is not the only means, on the other hand, of producing the relation of master and servant; the magistrates are empowered to oblige persons under certain circumstances to serve. Let me take notice, neither the air of *England* is too pure for a slave to breathe in, nor the laws of *England* have rejected servitude. Villenage in this country is said to be worn out; the propriety of the expression strikes me a little. Are the laws not existing by which it was created? A matter of more curiosity than use, it is, to enquire when that set of people ceased. The Statute of Tenures did not however abolish villenage in gross; it left persons of that condition in the same state as before; if their descendants are all dead, the gentlemen are right to say the subject of those laws is gone, but not the law; if the subject revives, the law will lead the subject. If the statute of *Charles* the 2d. ever be repealed, the law of villenage revives in it's full force. If my learned brother, the serjeant, or the other gentlemen who argued on the supposed subject of freedom,

dom, will go thro' an operation my reading assures me will be sufficient for that purpose, I shall claim them as property. I won't, I assure them, make a rigorous use of my power; I will neither sell them, eat them, nor part with them. It would be a great surprize, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself, in whatever method he might have the luck to invent. He must find his way to *London* on foot. He tells [13] his servant, Do this; the servant replies, Before I do it, I think fit to inform you, Sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands. Thus neither superior, or inferior, both go without their dinner. We should find singular comfort, on entering the limits of a foreign country, to be thus at once divested of all attendance and all accommodation. The gentlemen have collected more reading than I have leisure to collect, or industry (I must own) if I had leisure: Very laudable pains has been taken, and very ingenious, in collecting the sentiments of other countries, which I shall not much regard, as affecting the point or jurisdiction of this court. In *Holland*, so far from perfect freedom, (I speak from knowledge) there are, who without being conscious of contract, have for offences perpetual labour imposed, and death the condition annexed to non-performance. Either all the different ranks must be allowed natural, which is not readily conceived, or there are political ones, which cease not on change of soil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city, or he is not; if no condition, that he shall not be obliged to attend, from hence he is obliged, and no injury done.

A servant of a sheriff, by the command of his master, laid hand gently on another servant of his master, and brought him before his master, who himself compelled the servant to his duty; an action of assault and battery, and false imprisonment, was brought; and the principal question was, on demurrer, whether the master could command the servant, tho' he might have justified his taking of the servant by his own hands? The convenience of the public is far better provided for, by this private authority of the master, than if the lawfulness of the command were liable to be litigated every time a servant thought fit to be negligent or troublesome.

[14] Is there a doubt, but a negro might interpose in the defence of a master, or a master in defence of a negro? If to all purposes of advantage, mutuality requires the rule to extend to those of disadvantage. 'Tis said, as not formed by contract, no restraint can be placed by contract. Which ever way it was formed, the consequences, good or ill, follow from the relation, not the manner of producing it. I may observe, there is an establishment, by which magistrates compel idle or dissolute persons, of various ranks and denominations, to serve. In the case of apprentices bound out by the parish, neither the trade is left to the choice of those who are to serve, nor the consent of parties necessary; no contract therefore is made in the former instance, none in the latter; the duty remains the same. The case of contract for life quoted from the Year-Books, was recognized as valid; the solemnity only of an instrument judged requisite. Your lordships, (this variety of service, with diverse other sorts, existing by law here,) have the opinion of classing him amongst those servants which he most resembles in condition: Therefore, (it seems to me) are by law authorised to enforce a service for life in the slave, that being a part of his situation before his coming hither; which, as not incompatible, but agreeing with our laws, may justly subsist here: I think, I might say, must necessarily subsist, as a consequence of a previous right in *Mr. Stewart*, which our institutions not dissolving, confirm. I don't insist on all the consequences of villenage; enough is established for our cause, by supporting the continuance of the service. Much has been endeavoured, to raise a distinction, as to the lawfulness of the negro's commencing slave, from the difficulty or impossibility of discovery by what means, under what authority, he became such. This, I apprehend, if a curious search were made, not utterly inexplicable; nor the legality of his original servitude difficult to be proved. But to what end? Our legislature, where it finds a relation existing, supports it in all suitable consequences, without using to enquire how it commenced. A man enlists for no specified time; the contract in construction of law, is for a year: The legislature, when once the man is enlisted, interposes annually to continue him in the service, as long as the public has need of him. In times of public danger he is forced into the service; the laws from thence forward find him a soldier, make him liable to all the burthen, confer all the rights (if any rights there are of that state) and enforce all penalties of

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of neglect of any duty in that profession, as much and as absolutely, as if by contract he had so disposed of himself. If the court see a necessity of entering into the large field of argument, as to right of the unfortunate man, and service appears to them deducible from a discussion of that nature to him, I neither doubt they will, nor wish they should not. As to the purpose of Mr. *Stewart* and Captain *Knowles*, my argument does not require *trover* should lie, as for recovering of property, nor trespass: A form of action there is, the writ *per quod servitium amisit*, for loss of service, which the court would have recognized; if they allowed the means of suing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not saleable; does not take away their service. I would say, before I conclude, not for the sake of the court, of the audience; the matter now in question, interests the zeal for freedom of no person, if truly considered; it being only, whether I must apply to a court of justice, (in a case, where if the servant was an *Englishman* I might use my private authority to enforce the performance of the service, according to it's nature,) or may, without force or outrage, take my servant myself, or by another. I hope, therefore, I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity; nor doubt I your lordships discharge of yours to justice.

Serjeant *Davy*—My learned friend has thought proper to [15] consider the question in the beginning of his speech, as of great importance: 'Tis indeed so; but not for those reasons principally assigned by him. I apprehend, my lord, the honour of *England*, the honour of the laws of every *Englishman*, here or abroad, is now concerned. He observes, the number of 14,000 or 15,000; if so, high time to put an end to the practice; more especially, since they must be sent back as slaves, tho' servants here. The increase of such inhabitants, not interested in the prosperity of a country, is very pernicious; in an island, which can, as such, not extend it's limits, nor consequently maintain more than a certain number of inhabitants, dangerous in excess. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to support it, any farther than the produce of the earth will answer the demand of necessaries. In that case money enriches the inhabitants, as being the common representative of those
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necessaries; but this representation is merely imaginary and useless, if the encrease of people exceeds the annual stock of provisions requisite for their subsistence. Thus, foreign superfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a state, still worse. Mr. *Dunning* availed himself of a wrong interpretation of the word natural: It was not used in the sense in which he thought fit to understand that expression; 'twas used as moral, which no laws can supercede. All contracts, I do not venture to assert are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, established for moral purposes, enforcing moral obligations; the right of taking property by descent, the legitimacy of children; (who in *France* are considered legitimate, tho' born before the marriage, in *England* not :) These, and many other consequences, flow from the marriage properly solemnized; are governed by the municipal laws of that particular state, under whose institutions the contracting and disposing parties live as subjects; and by whose established forms they submit the relation to be regulated, so far as its consequences, not concerning the moral obligation, are interested. In the case of *Thorn* and *Watkins*, in which your lordship was counsel, determined before Lord *Hardwicke*.—A man died in *England*, with effects in *Scotland*; having a brother of the whole, and a sister of the half blood: The latter, by the laws of *Scotland* could not take. The brother applies for administration to take the whole estate, real and personal, into his own hands, for his own use; the sister files a bill in Chancery. The then Mr. Attorney-General puts in answer for the defendant; and affirms, the estate, as being in *Scotland*, and descending from a *Scotchman*, should be governed by that law. Lord *Hardwicke* over-ruled the objection against the sister's taking; declared there was no pretence for it; and spoke thus, to this effect, and nearly in the following words—Suppose a foreigner has effects in our stocks, and

[16] dies abroad; they must be distributed according to the laws, not of the place where his effects were, but of that to which as a subject he belonged at the time of his death. All relations governed by municipal laws, must be so far dependant on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. In the case of master and slave, being no moral obligation, but founded on

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principles, and supported by practice, utterly foreign to the laws and customs of this country, the law cannot recognize such relation. The arguments founded on municipal regulations, considered in their proper nature, have been treated so fully, so learnedly, and ably, as scarce to leave any room for observations on that subject: Any thing I could offer to enforce, would rather appear to weaken the proposition, compared with the strength and propriety with which that subject has already been explained and urged. I am not concerned to dispute, the negro may contract to serve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. 'Tis remarkable, in all *Dyer*, for I have caused a search to be made as far as the 4th of *Henry* 8th, there is not one instance of a man's being held a villain who denied himself to be one; nor can I find a confession of villenage in those times. [Lord *Mansfield*, the last confession of villenage extant, is in the 19th of *Henry* the 6th.] If the court would acknowledge the relation of master and servant, it certainly would not allow the most exceptionable part of slavery; that of being obliged to remove, at the will of the master, from the protection of this land of liberty, to a country where there are no laws; or hard laws to insult him. It will not permit slavery suspended for a while, suspended during the pleasure of the master. The instance of master and servant commencing without contract; and that of apprentices against the will of the parties, (the latter found in it's consequences exceedingly pernicious;) both these are provided by special statutes of our own municipal law. If made in *France*, or any where but here, they would not have been binding here. To punish not even a criminal for offences against the laws of another country; to set free a galley-slave, who is a slave by his crime; and make a slave of a negro, who is one, by his complexion; is a cruelty and absurdity that I trust will never take place here: Such as, if promulged, would make *England* a disgrace to all the nations under earth: For the reducing a man, guiltless of any offence against the laws, to the condition of slavery, the worst and most abject state, Mr. *Dunning* has mentioned, what he is pleased to term philosophical and moral grounds, I think, or something to that effect, of slavery; and would not by any means have us think disrespectfully of those nations, whom we mistakenly call barbarians, merely for carrying on that trade; For my part, we may be warranted, I believe, in affirming the morality

[17]

or propriety of the practice does not enter their heads; they make slaves of whom they think fit. For the air of *England*; I think, however, it has been gradually purifying ever since the reign of *Elizabeth*. Mr. *Dunning* seems to have discovered so much, as he finds it changes a slave into a servant; tho' unhappily, he does not think it of efficacy enough to prevent that pestilent disease reviving, the instant the poor man is obliged to quit (voluntarily quits, and legally, it seems we ought to say,) this happy country. However, it has been asserted, and is now repeated by me, this air is too pure for a slave to breathe in: I trust, I shall not quit this court without certain conviction of the truth of that assertion.

Lord *Mansfield*—The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in *Jamaica*. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: On its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: In which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the *American* laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of *England*. We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: 'Tis now about fifty years since the opinion given by two of the greatest men of their own or any times, (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages, is a clear indication they did not think themselves free by coming hither. The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens. There is a case in *Hobart*, (*Coventry* and *Woodfall*,) where a man had

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had contracted to go as a mariner: But the now case will not come within that decision. Mr. *Stewart* advances no claim on contract; he rests his whole demand on a right to the negro as slave, and mentions the purpose of detainers to be the sending of him over to be sold in *Jamaica*. If the parties will have judgment, *fiat justitia, ruat cælum*, let justice be done whatever be the consequence. 50 l. a head may not be a high price; then a loss follows to the proprietors of above 700,000 l. sterling. How would the law stand with respect to their settlement; their wages? How many actions for any slight coercion by the master? We cannot in any of these points direct the law; the law must rule us. In these particulars, it may be matter of weighty consideration, what provisions are made or set by law. Mr. *Stewart* may end the question, by discharging or giving freedom to the negro. I did think at first to put the matter to a more solemn way of argument: But if my brothers agree, there seems no occasion. I do not imagine, after the point has been discussed on both sides so extremely well, any new light could be thrown on the subject. If the parties chuse to refer it to the Common Pleas, they can give them that satisfaction whenever they think fit. An application to parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future. The court is greatly obliged to the gentlemen of the bar who have spoke on the subject; and by whose care and abilities so much has been effected, that the rule of decision will be reduced to a very easy compass. I cannot omit to express particular happiness in seeing young men, just called to the bar, have been able so much to profit by their reading. I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given. [18]

Trinity Term, June 22, 1772..

Lord *Mansfield*—On the part of *Somerset*, the case which we gave notice should be decided this day, the court now proceeds to give its opinion. I shall recite the return to the writ of *habeas corpus*, as the ground of our determination; omitting only words of form. The captain of the ship on board of which the negro was taken, makes his return to the writ in terms signifying that there have been, and still are, slaves to a great number in *Africa*; and that the trade in them is authorized by the laws and opinions of *Virginia* and

and *Jamaica*; that they are goods and chattels; and, as such, saleable and sold. That *James Somerset*, is a negro of *Africa*, and long before the return of the king's writ was brought to be sold, and was sold to *Charles Stewart*, Esq. then in *Jamaica*, and has not been manumitted since; that Mr. *Stewart*, having occasion to transact business, came over hither, with an intention to return; and brought *Somerset*, to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been, and still continues; and that the negro did remain till the time of his departure, in the service of his master Mr. *Stewart*, and quitted it without his consent; and thereupon, before the return of the king's writ, the said *Charles Stewart* did commit the slave on board the *Ann* and *Mary*, to have custody, to be kept till he should set sail, and then to be taken with him to *Jamaica*, and there sold as a slave. And this is the cause why he, Captain *Knowles*, who was then and now is, commander of the above vessel, then and now lying in the river of

[19] *Thames*, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the court. We pay all due attention to the opinion of Sir *Philip Yorke*, and Lord Chief Justice *Talbot*, whereby they pledged themselves to the *British* planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by Lord *Hardwicke*, sitting as Chancellor on the 19th of *October* 1749, that *trover* would lie: That a notion had prevailed, if a negro came over, or became a christian, he was emancipated, but no ground in law; that he and Lord *Talbot*, when Attorney and Solicitor-General, were of opinion, that no such claim for freedom was valid; that tho' the Statute of Tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*; the only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has

been

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been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of *England*; and therefore the black must be discharged.

Pitt against Harbin.

MRS. *Harbin* devised to her four nieces, and on the death of any of them without issue, the whole should go to the survivor or survivors; but if any of her said nieces died, having child or children, then the share to go to such child or children; if all died without issue, then the whole to her nephew.

Catherine Pitt, one of the nieces, married *G. Pitt*, and had issue *W.* and *G.* Both died in the life of the mother; *G. Pitt* left issue *Eliz.* and *G.* grand-children of *C.* the three other nieces died without issue, one in 1712, *C.* in 1745, and another in 1759, and *F.* in 1765. The will was made in 1705.

On the death of *F.* the grand-children of *C.* claim the whole. On the other hand, the representatives of Mrs. *Harbin* say, that nothing but the single share which *C.* took by survivorship goes to the grand-children of *C.* [20]

It was argued, that if a niece left children, 'twas meant those children should take all by survivorship, which their parent could have taken if living; and all that on failure of issue was to have gone over to the nephew of the testatrix, which was the whole. And that the nieces who survived *C.* and died without issue, could take only a life interest, which they could have preferably to the issue of the deceased sister, but no more; they could not take any part but by implication, being grand-children, and not children; and if they take at all by implication, they shall take the whole. On the other hand, that consistently with the intention of the testator, no survived share can go to the representatives of the dead niece. How is it possible, if there be an accrued share to sisters representatives during the term, the whole should go to the nephew? And yet the whole is to go to him, or none.

Can the children of C. take? The testatrix says there shall be no survivorship. They can take no more than C: at her death was intitled to, which was only her own and the share of one of the sisters. If C. had survived all four sisters, they would then have been to take the whole. It was contended, on the part of the children, they should take as of property undisposed any where else.

Sir *Thomas Sewell*, Master of the Rolls—The intention of the testatrix, clearly made out from the will, is, that the children, if any, should take the whole. I think no conjecture should be drawn; but from necessary implication, the will must be preserved.

She gives in legacies 150*l.* to her brothers and sisters, and 20*l.* to one niece, 10*l.* a piece to the other three.

She limits the interest for as much of the term as shall run out during the life of her nieces; but this no more, expressly, than a life interest to the nieces, remainder in the term to children, if any; and if any of the nieces die without children, then the part or share shall go to the survivor or survivors. The last died without children; and here lies the difficulty. She meant, I think, not only the share accruing to the sister leaving issue at the time of her decease, but all the survivorships of the other shares, to go to her child or children; if other or others had been here, instead of survivor or survivors, there could have been no doubt: The meaning then must have been, the children should take; the whole share should have gone to the children. Suppose it otherwise, on the child or children [21] dying in the life-time of any of the four sisters, the share of the children would have been taken out of their representatives, and gone to Mr. *Windham*, which is absurd.

Directions given accordingly.

University Case.

Marriet *against* Gregory.

INFORMATION in the nature of a *quo warranto* against the defendant, to shew cause, why he holds the office of fellow of *Trinity-Hall*. The election was by the fellows, in the absence of the master. It appeared, it seems, on affidavits, that the master by the statute was to be forewarned and waited for; that the election was to have ten days

days notice, was not to be in vacation ; and that in twenty-eight days, inclusive of the ten, the election must be made, otherwise lapse to the master ; and that the master must reside, and not even lye a night out without leave of the college. Dr. *Marriot* being absent, the fellows gave notice on the first day of term, that an election would be on the 20th of *October*. The master writes word, being absent, that his health will not permit him to come before the 8th of *November*, (which was a day after the twenty-eight days ;) but if he does not come then, they may go on without him. They did not elect till the 3d of *November*. Objected, that this election was bad, and consequently the title of Mr. *Gregory* ; that they should have waited for the master ; that the election could not be good in his absence ; and that at least, in this, the title of the gentleman chosen as fellow was bad, that he was admitted without the master. On the other hand, that the court had not strictly an authority to grant informations ; for that colleges in the university were not within the statute of 9 *Queen Anne* ; but that they were agreed to waive exceptions of form, and rest on the merits. That the master was bound to have been resident, that he was both *præmonitus* & *expectatus*, according to the statute, forewarned and expected, a reasonable time ; that he had no right to appoint a day ; that if he had been there, and had not given a vote, they might, by the statute, have elected without him : The same if he was absent beyond due time, and had by his refusal to attend precluded himself from giving a vote. That had he been present, and given a vote with the minority, the election by the majority would have been good without him ; much more, when he chose to be absent, having due notice, and more than was strictly due ; and that the election was therefore good. Contended by Mr. *Dunning*, that it was not good.

A form of government there must be in the college subsisting in some persons, and to which an head is necessary. [22]

The statutes of the founder have appointed an head ; that is, the master. “ *Conformem socii custodis suffragio,*” are the words. *Præsentia custodis necessario requiritur, suffragia majoris partis sociorum sufficiant, si magister votum non dederit, aut si alia parte det.* The power of the master was restrained from stopping the election, and also from absenting himself *si præmonitio fuerit & expectatus fuerit, neque interesse voluit*, the fellows may elect.

There

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There can be no reason to raise a doubt, more than if the constitution had been recent. Plea of usage avails not against the master.

The masters have usually been of another college; are not bound by the constitutions to attend; but have a right. Forty electors in his absence, against five in his presence, are of no import; he has probably in most, certainly in many, by his substitute been present; as by the constitution he might. Had this been the case before the court, probably the five and the forty would have changed sides.

An instance should have been brought, when he had expressed his pleasure to be there, and they had proceeded without him, and the election allowed.

By the college statutes, there is a prohibition to proceed to election in vacation, and till after ten days are expired, that absent fellows may have an opportunity to attend, in express terms. Exceptions have been taken, by his adversaries, against Dr. *Marriet's* absence; though, I believe, they set him the example.

Exceptions to the vast difficulty of informing the master of the election proposed; as if all the business, real business in the world, were confined within the college walls; and as if the same monks filled those walls as formerly, who did not know where *London* stood.

Therefore, on the eleventh day, without notice, the fellows proceeded to the election; as if it were not only competent under the statute, but necessary, to proceed immediately. Wherever the founder has not limited the master's authority, he may make bye laws not inconsistent with the law of the land; unless the appointment of a substitute had been provided, they could not without notice have concluded the election without his personal appearance.

[23] In the case of the Mayor of *Bedford*, who absented himself on an election, the recorder took on himself to proceed without the mayor; it came before this court, and the election was set aside. The objection is nugatory, that he may evasively absent himself, and lay claim to the nomination: There are compulsive powers, and penal inforcements, in this case; and the claim of nomination would be of no effect, if unduly set up. 'Tis absurd, to suppose such ignorance in the visitor, having magnified, for reasons, the collegiate jurisdiction, that he should not distinguish such a case. That the constitution of *premonitio*, that they should not elect while the master was taking a ride,

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ride, but wait till the ride is over, as the sense of *expectatus fuerit*, seemed set up for joke, but was seriously used.

The master, though perceiving no doubt, as was avowed, his presence would have no influence, yet signified his intention. They would not however allow him the mere feather of admission. The bells set a ringing by way of triumph; though that was regularly to be at the arrival of the visitor, when the election was concluded; the master called on, by way of insult sure, when he was to be a mere cypher. He was not to come among them in their hours of exultation, amidst the ringing of the bells, to announce the joyful tidings; and give any painter that might be in town, an occasion of describing the happiest man in the world, a fellow newly elected. All this was to be nothing to him; when they were subsided into their monastic sadness, then he was bound to partake in it; their scenes of festivity he was banished from, though his known humanity must have been delighted with the sight.

Three days before the time appointed by Dr. *Marriet*, they thought fit to elect; not that they thought they were bound to employ all the time from whence the election might commence, in the duties of electing; for they did not.

They say the solemnities of the law might be omitted, and the *præmonitio* therefore of an absent master not necessary. Did the founder mean so? No. He is to be waited for, says the founder. But who, say they, is to admonish, or to give warning? The senior fellow, or the whole body, as their own sense of the matter is. Supposing they imagined their election valid without the master, for a moment suppose it to be so; why not, at least, wait for the admission by the master? which could not affect their right of election, and is not worth insisting on by Dr. *Marriet*, without establishing the material right of election. I hope, the fellows, having sworn obedience to the master, will not think it at least unreasonable, to be obliged by a judicial decision to the performance of their oaths: An obedience so fit and becoming, that, I think, I may venture to affirm no gentleman would refuse, but from the prejudice of trifling quarrels. They, indeed, on their part, and I for my client, whether as to judges authorised by the law to determine the cause, or arbitrators chosen by consent of both parties, have submitted the matter in question to this court. Let them not, therefore, having brought their cause hither, assert a supposed power to wait for their visitor, whom

whom neither we nor they know, and of whom no traces are discovered for these three hundred years that I can make out. In the mean while, instead of any attention to the profession of the law, it might be a music college, a college of rope-dancers, according to the various genius of their members, till the *Jews* are pleased to be convinced of a *Messiah* having come. 'Tis exactly the same case, as where the visitatorial power, and that of the master coincided; and therefore on dispute, a reference was necessary to this court. In Sir *John Strange's Reports*, *The King* against *Bentley*, it was determined, as there was no visitor for the body of the university, the judgment belonged to this court.

Why are we to examine concerning a non-entity?

On an information on the 9th of Queen *Ann*, mayors and other officers, will take in master of a college as head of a lay-corporation, the fellows are as aldermen; and therefore come within the description. This was denied, because they are said to be officers of a corporation in cities or towns; and are thus contradistinguished by the locality. How contradistinguished? They use the largest description—or other place: Has *Trinity-Hall* no locality? We are warranted to say, therefore, this place is a corporation, is subject to the jurisdiction of this court. A *mandamus* has not been unusual, but otherwise: It has not been applied for before in the instance of an university, for a reason which I am solicitous to maintain, for the credit of the university; no other college, nor that before, has been in the state in which *Trinity-Hall* now is. If a man is improperly kept out, this court will see that he be put in; if improperly put in, that he be put out. I think, this power will not be easily disputed.

Mr. *Davenport*—The question before the court, in the case of *The King. v. Corporation of Hertford*, quoted by Mr. *Dunning*, was only to determine whether a misdemeanor, battery or trespass. With respect to *Winchester College*, as the warden, being bishop of *Chester*, was also visitor, they were obliged to have recourse to the King's jurisdiction, because the master could not visit himself.

Mr. *Dunning* continued—It has been said to the merits of the cause, it were better to suffer an injustice from irregular proceedings on their part, than the inconvenience which they said would arise from the court's interfering.

[25] What the inconvenience from the interposition of the court can be, to prevent irregularities and undue elections, which

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which here is no other power to prevent, if they happen in this college. 'Tis said, *pramonition* must have been when the master was absent; for, to what purpose when he was present? They might have found, if they had gone to 1698, instead of 1699, that a protest was made, and by the senior fellow, against elections in absence of the master. And in 1691, a decree, when the majority of the fellows were agreed, that they should have waited for the master. The election, by the statute and their own confession, was not necessary, nor could be without the master's presence, if he chose to come in eighteen days after the tenth: After which, if no election is made, within these eighteen days, the election devolves to the master. They anticipated four days. I submit the election is void, for want of the presence of the master; and for want of admission by the master.

Lord Chief Justice—This is an application by Dr. *Marrist*, master of *Trinity-Hall*, which is a college in *Cambridge*, that an information may be entered in the nature of a *quo warranto*, against a Mr. *Gregory*; who, he complains, has usurped a fellowship of that college. It has been objected, that there being no heirs to the visitor, it belongs to the King; who waives it. It might have been objected, this is an eleemosinary foundation; and therefore, goes to the King in Chancery. But this is not upon a case of charity, but of a lay-foundation; and therefore the case comes before the King in this court.

In the *Winchester* case, it was held a suspension while the wardenship and visitation coincided; and that so long this court had jurisdiction.

In the act 19 G. 2. there is a provision inserted, that in case a dispute should arise about the election of a master or fellows, it should not be referred to the visitatorial power of the King, but to the King here: And judgment must certainly be according to the statutes of the place. An objection has been raised, that an information in the nature of a *quo warranto* will not lie in this court, nor can be filed by the coroner of this court; but by the attorney-general, who may choose whether he will file or no, as it does not come within the 9th of Queen *Ann*. But it has been, I think, truly asserted, such information existed before the 9th of Queen *Ann*; and if so, it is not taken away. It may become very material to persons as possessed of franchises. It was very right in counsel on both sides to enter into the merits of the cause; that the court, who is obliged to find a remedy, if that on information would not do, might

[26] might not be compelled to find one. If Dr. *Marriet* were so disposed, he might nominate another to be fellow, as by lapse: But it has been dropt by counsel, that Dr. *Marriet* has no objection to Mr. *Gregory*, and would not be willing to set up a person who would be entitled to try the right; though thinking himself injured. The master could not have a right to appoint the day; for then the *premonitio* would have been absurd. After the ten days, and not before, they are to meet, and then may proceed to election within the term allowed.

The master gives notice in this case, in these words—"I cannot possibly, by reason of my health, go on before the 8th of *November*, and therefore appoint that day; and if I don't come down, you may go on the day after:" On which it's observable, on the Doctor's own construction of the statute, he appointed after the lapse of the term; for he says, the twenty-eight days include the ten from the first day of term; it therefore expired on the 7th of *November*: And the fellows might well be unwilling to subject themselves to a three or four years litigation. As to admission, the absence of the master is to answer for it. The statute expressly says, "the master shall not lie one night out of college without leave." I am sorry they have interpreted, by giving a beneficial construction, as they do, that the master and fellows are to lay every night out of college. I hope it will not extend to compel residence, as it has been understood otherwise so many years; but, in this respect, his absence precludes him. It appears to me, the admission, as set forth in the affidavit by the senior fellow, is sufficient; and that Dr. *Gregory* is sufficiently elected.

Mr. Justice *Aston*—It is very material, to consider in what manner the exercise should be of an information, in the nature of a *quo warranto*.

The precedents are in the name of the attorney-general; but a great number have been found, 'tis asserted, on a late search, filed by the coroner of this court.

Rule discharged.

Bail.

EXCEPTION against three offered for bail instead of two: Not allowed. I suppose, because notice was given of all to justify; so that the plaintiff might have taken them or any he pleased: For notice, that *A. B. C.*
or

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or two of them, will justify, is bad; as appears by the opinion of the court in another case.

Irregularity.

ON a motion to set aside proceedings for irregularity: The irregularity complained of was, the process being served on the sheriff of *Middlesex*, when it should have been *London*.

It proved to be a mistake of the person who served the process, as to the situation of the premises; which were on the right side of *Chancery-lane*, and all the houses on that side he conceived to be in *Middlesex*; as it seems, indeed, they are, except one or two. They suffered the plaintiff to go on, without notice of the irregularity, till the day before he might have signed his judgment.

[27]

Rule to set aside the proceedings, but without costs.

Goodlight *against* Bridge.

Confidence between Client and Attorney.

TH E court will not permit an attorney to alledge, his client has declared before action brought, he will waive a forfeiture on which he supports his action.

Anonymous.

ON a verdict against a man, for having in his possession a piece of old copper mark with the broad-arrow. Motion to mitigate the fine; but it was not conceived within the judges authority by the statute. The man appeared simple, and really ignorant of the meaning of the mark. Affidavit that he was not worth above 30 l. clear.

Judgment, with a fine of 40s.

Abatement.

WH E N a woman is sued as feme-sole, and between the original process and appearance, marries, the action shall not abate on a writ of error; and to this, *King v. Jones* (Lord *Raymond*) was cited.—Therefore, to reverse judgment or abate the action, the plea must be on a writ of

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of error, that she was, at the time of suing out the original writ, and still is, a feme-covert.

Baxter against The Corporation of Shrewsbury.

ON a motion for a new trial, as on a verdict against evidence; the jury having found a customary right for persons born in the place to be admitted, paying 5 l.

[28] The court, particularly Justice *Aston*, seemed to doubt the existence of such a bye-law; and it stood over. And afterwards, in the same term, Lord *Mansfield* delivered his opinion thus—

We all think this a matter of great importance, to come to a solemn determination; though by what course requires to be deliberately resolved.

If the 5 l. fine be only a bye-law, it might be repealed; if usage, not. The jury indeed found it an usage, but new evidence has arisen since.

Whether it extends generally, or no, is a point of very weighty discussion. The largeness of the fine is difficult to be accounted for; but my brother *Aston* has mentioned toll, and other pecuniary advantages, which may be a good cause why the freemen of *Shrewsbury* should be subject to so large an one.

We think the rule ought to be discharged.

Appearance to Judgment.

ON a motion of Mr. *Gould*, to dispense with the personal appearance of certain delinquents to receive judgment:

It appeared they were overseers, and had dispossessed a poor woman out of a little cottage where her father had lived fifty years, on an apprehension that she would marry, and thereby gain a settlement. The woman was wandering without an house, and her cottage had been destroyed in the night.

Lord *Mansfield*—The court suspends the rule for commanding or dispensing their personal appearance, 'till it be known whether the overseers will rebuild the house, at the expence computed of 20 l. and pay the expence of journies and time set by the court. If they fail of so doing, it is likely to turn out much more.

Seale

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Seale *against* Hunter.

To set aside a Verdict for excessive Damages.

ON an action for damages for the value of a greyhound, the plaintiff laid his damages at 20 l. The jury by their verdict gave 80 l. and one of the jurors said, he would not get off the bed on which he then threw himself, till they gave 500 l. Motion to set aside the verdict, as exceeding the damages laid by the plaintiff in his declaration. [29]

It appearing to the court that the verdict did exceed, and that the jury had taken into consideration abusive words spoken, as if the action had been, *Et alia enormia*, the verdict was set aside.

King *against* Badford.

ON an information for suffering and exercising within his house billiards and other unlawful games.

The man was not summoned, the games not expressed, except billiards, which were laid as against the 30 G. 2. which was held not to extend, except to persons under particular descriptions; and billiards were not taken to be within any other act except, perhaps, 33 H. 8. which inflicts different penalties from what were intended by the information, and subjects the offender to the cognizance of a different jurisdiction.

Rule to shew cause quashed.

Bail.

IF rule be to put in bail within four days, and bail be put in after the four days, and before motion for attachment, it seems good. *Sed Q^u.*

Bail in Felony.

ON return to an *habeas corpus*, prisoners were brought before the court, on suspicion of stealing feloniously a large quantity of cotton.

It was pleaded, that the commitment being on suspicion, and proprietors in the linen trade commonly, on account of the

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the great loss sustained, charging the whole stock, there was no ground sufficient to suppose felony on account of quantity; and therefore, that they be admitted to bail.

1st *Objection*. That they may take their trial in five days at the sessions; and that the prisoners got into their hands a large quantity, under pretence of printing, but took out the marks. Therefore the intent made them guilty of stealing *ab initio*; as in an horse taken from the owner under pretence of trying his paces.

[30] 2d *Objection*. To three of the bail, six being offered, and that they must give four bail; and Mr. *Bearcroft* said, that when more was offered than the law will require, as four are required in the case of felony, they must be able to justify all.

Court—No such rule.

3d *Objection*. In the case of felony, less than four are never taken.

The court denies.

4th *Objection*. Against the bail; notice of six, and three allowed; one of whom does not appear.

Court agreed not to admit bail, unless the third appeared; and observed, that it is an exception against the person offering bail, to have so many excepted: One was received at last, of those excepted.

The prosecutor consents that they stay in *Tothill-fields*, on condition, that they be delivered up on notice.

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Barker *against* Freeman.

On Construction of a Deed.

LIMITATION to support an estate tail, ran in the [3^d] following terms——

Estate for ninety-nine years, if the tenant should so long live; and after his death to trustees, to preserve contingent remainders during his life.

Argued, That this limitation being repugnant, the subsequent estates were all void. That the design of the settler could not be known; that it was more than obscure and untechnical, it was unintelligible, nonsensical, and impracticable; and an utter contradiction. The settler was master of the question, and has said, the estate of the trustees shall not commence during his life, but after his death. An estate for ninety-nine years, is not an estate for life: So that the remainder is void at its creation, for want of particular estate to support; for it is not to commence till after his death. And, in construction of law, his life may out stand the term, and then there will be no estate out of which the remainder can spring; for it cannot vest during his life, he has expressed the contrary; and after his death it cannot, because the particular estate is short of an estate for life.

In the case of *Dormer v. Portefeu*, 1762, in the House of Lords.—Limitation of an estate to *John Dormer*, and his heirs; and if he died without issue, to *Robert Dormer* for ninety-nine years. And on his death, or sooner expi-

[32] ration of the term, to the trustees named, to preserve contingent remainders during life. The same incongruity was alledged : And had it not been for the words “ or sooner expiration of the term,” would have been a case in point. An estate for life, to commence after death, is void : But the expiration of the term might have happened by effluxion, forfeiture, or various ways. Therefore, if it was then determined those words only, “ or sooner,” &c. made it good, it appears an express determination in favour of the present objection. As to the doctrine of rejecting insensible words ; it cannot be disputed, they may reject, or more properly disregard, insensible words ; that is words, I suppose, that cannot be understood. Words are not insensible that are contrary to other words in an instrument, but very operative ; they make it effectually void.

Serjeant *Glyn*, on the other side—This is a point which your lordships left open, having decided the rest ; and is, whether an estate of freehold passed to the trustees to preserve contingent remainders, or not. In which last case, the whole intent fails of all parties. We contend it to be a remainder to the trustees of an estate of freehold, an estate for years only between ; which being a chattel interest, the freehold, having nothing else between, commenced immediately to the trustees.

The very part to which your lordships apply your attention at present, proves the intent, that the trustees must take immediately on surrender, forfeiture, or other accidental lapse of the term, before death of the tenant for years.

The true method of construing, we submit, is—rejecting the words “ after the decease,” or supplying other words, “ or sooner expiration,” &c. It is said, there’s no pretence nor precedent on the books, for rejecting any words not merely insensible. In Lord *Coke*, an estate to heirs male, without saying of his body, makes a good fee-simple, rejecting the word “ male.” So in all conditions of a deed, or limitations of a settlement, a word not only that defeats, but makes less beneficial than the former, is always, by the constant course of the construction of law, rejected.

In this case, if we do not reject the words contended for, a settlement in consideration of marriage will be totally defeated.

Considered as a common condition, it shall be taken beneficially to the grantee ; that is, in the import of it to the trustees ; but it is objected, why should we not reject words repug-

repugnant, on one side as well as on the other? And then the whole intent would perish to the parties on both sides; contrary to the maxim, *ut res magis valeat quam pereat*; so by the mere dry rule of construction, we must reject in favour of the grantee. They say, rejection would be insufficient; but we must supply, I must say, by implication of law. I submit, the words "or sooner expiration" might be understood. It was held in *Dormer v. For-* [33]
tescue, they might, even supposing they were not taken as inserted, and that the insertion was principally for the benefit of those who were to take advantage of forfeiture. I hope, therefore, your lordships will adjudge the estate to be vested in the trustees, and that the plaintiff shall recover.

Mr. *Dunning*—I never understood, that every deed was absolutely indefeasible. It seems, the intention is all in all; and once find out that, all expression is superfluous, and no repugnancy of words can cover the intention, but that it will appear with sufficient certainty and effect. I never did understand such an extent of construction was or could be allowed. If the intention be discovered to preserve contingent remainders; if he had only named the persons he meant to take in succession, without appointing limitations or ascertaining the estate to pass, and was to say only "'tis my intent that contingent remainders be preserved," the court will make the limitations, ascertain the quantity and quality of the estate; and, on this single hint, frame and execute for him, a complete will. Is an estate, then, in *futuro*, to be made one to commence immediately; an estate for years, to be made a freehold; an estate for life, a fee-simple! (All these are new principles, positively asserted.) What would not be the confusion? All the language of the law, all the technical terms insisted on in such numbers of cases, all vanish: All were argued (if intention was enough) by ignorant men, and determined by ignorant judges. It seems to strike at the foundations of all law. I have often heard, one only ill decision is productive of more mischief than can possibly be compensated by any good to individuals: But it seems we must seek from authority, what can't be had from argument. In the determination of the case which has been disputed between us, which my learned friend asserts, impowers the court to alter and insert, and reject generally, the opinion is, we cannot alter words in the deed; we cannot insert words, but we may reject words merely insensible. If there
is

is room for two constructions, equally legal, then, I understand, the court may choose that which answers the intent, *ut res magis valeat*. It is a great deal more, that the court is required to do here, than the court ever granted to a will: It defeats the favourite succession of the law, by taking it from the heir at law. Even if a testator says, I mean to disinherit my heir at law; he's a rascal, and shall never have a sixpence of my money;" if he limits it no where else, it goes to the heir: And I hope this will be the last of the laws of *England* which shall be over-turned.

Lord *Mansfield*. After reciting the deed, concluding with limitations in tail to the first and every other son, his lordship proceeded to judgment upon the point particularly in question.

[34] The intent of the parties depends on this, whether there is a good estate of freehold, to support the limitations to the first and every other son.

There is no resulting use in the grantor; nor springing use, as in an executory devise, to the trustees. The difference of favour between a will and a deed, is, as to the technical terms of limitation, which are required in a deed, but may be dispensed with in a will: But intent (as in Lord Chief Justice *Willes's* opinion) must be equally preserved. This contradiction leaves no doubt of the intent, it being on a valuable consideration for a settlement to issue. The great opinion in the Lords went against the strict, technical, verbal terms. The limitation is not after death there, simply, but the end or sooner determination. Where there are any parts to shew intention, the courts must lay hold of them; as, "or other sooner," &c. But as these words would have overturned the latter branch, (for it's a limitation to the first and every other son living; the ancestor's was an estate interposed, without freedom to support it) therefore they rejected the words "after decease," as insensible; though, certainly, they are words not without an operative meaning.

The limitation is to prevent the father, with consent of the son, from barring the remainders without the trustees: Are not, here, the words "after his decease," followed by "to preserve contingent remainders during his life," insensible?

Therefore, I am of opinion, either "after decease" should be rejected, or "other sooner determination" be supplied: And this will be rule, when intent can't be made out from the body of the deed.

Bail.

Bail.

NO T admissible, on account of effects abroad.

Award.

MOTION to set aside an award for that the arbitrator had awarded costs of arbitration, without special authority for so doing.

Mr. *Mansfield* argued, That arbitrators, without special authority, have no such power.

Mr. *Dunning*—This is not a special arbitration, but a general one under the act, to determine all differences, and do complete justice between the parties; the costs of the action and arbitration, as well as the debt, have been given by the arbitrators against the defendant in this case; because, in their judgment, the defendant should never have litigated. [35]

Mr. *Mansfield*—I conceive, the power of the arbitrators is to decide differences between the parties at the time of submission; and, besides, there is the great inconsistency of its being said that costs shall not be paid, and yet they tax costs.

Mr. *Dunning*—Supposing the debt 100 l. and the costs 5 l. and 105 l. costs given; then they say they will give no costs; that is, having included the costs in the full sum, they add, for fear of mistake, the costs shall not be paid besides.

Lord *Mansfield*—It only appears an inaccuracy in the wording; but I see no reason to set aside the award on it.

Mr. *Mansfield*—If your lordship thinks the award may be substantiated in the rest, the costs of the arbitration, at least, will not be good.

Lord *Mansfield*—'Tis a very nice distinction: It does not appear upon the face of the award; if it had, you might legally have taken avail.

Mr. Justice *Aston* [I think] of the same opinion.

Mr. *Cowper*—In the case of *Giles v. Underwood*, costs of the reference were not allowed to be discharged; it not appearing upon the face of the award.

Lord *Mansfield*—The case cited by Mr. *Cowper* is in point.

Let the rule be discharged.

Gregory *against* Onslow.

ON a motion for an attachment for contempt, in resisting the sheriff of *Shrewsbury*, on an arrest for debt.

On the plaintiff's affidavit, it appeared, that they were assaulted in attempting to execute the warrant, and one had his arm beaten to a jelly; and that the defendant *Onslow* took from them the King's warrant; and that they got away the defendant by force, from the hands of legal process.

[36] Mr. *Bearcroft*—That, if true, the sheriff might and ought to have returned a rescue; that they had behaved violently, and refused bail; and that, except the metaphorical injury of being beaten to a jelly, all the harm that had happened was the entanglement of one of their spurs in one of the women's petticoats. As for the contempt of the court charged, in saying many deriding words, they could not have answered more positively and precisely, if they had answered to interrogatories. And hoped, therefore, his lordship would not think it necessary to interpose, by the extraordinary assistance of attachment, but discharge the rule without costs.

Mr. *Dunning*, on the contrary, That the sheriff had a right to choose his remedy, if he thought attachment better than returning a rescue. That the metaphorical harm was only metaphorically answered; for they admit the plaintiff, being a great large man, got a little hurt, but don't believe his side was all a jelly. At least, then, I shall gain by an attachment, an estimate of the quantity of his side that was made jelly. *Onslow* owns, that being struck at, he gave a blow with the shovel at *Gregory*; and seems to have relied much on his wife, mother and sister, to facilitate his escape. This, my friend says, is very natural: I admit it; but I hope he does not think it legal.

As to the objection of not returning a rescue; they object being treated with great lenity by a process being taken out, where they will have every advantage legally possible, instead, of being concluded by a much severer mode of action.

The contempt of the court will perhaps be better answered, when they come to swear upon interrogatories, in answer to the charge against them, before the master of this court.

Lord

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Lord *Mansfield*—There appear faults on both sides; *Onslow* confesses striking first, (how the shovel came in does not appear;) and they refused bail.

I think it would be improper to proceed on an attachment, as the parties could not answer farther.

Let the rule be discharged.

Elderton *against* Freemantle.

ON a promissory note for a debt contracted by an insolvent debtor before his discharge, given to a trustee for the benefit of the creditor.

Turner v.
Schomberg,
Strange's
Reports.

Mr. *Hammond*—An insolvent debtor, before he went to prison owed 36 l. he was afterwards discharged by the insolvent act; and then agreed and promised to pay, by two guineas a month, the whole sum; and having thus discharged twelve guineas, on his inability to pay more, the creditor came on him to prove a new debt, on a new promise: But not allowed.

[37]

In the case of *Ford v. Chiltern*, Common Pleas, *Hilary* Term 1772. *Chiltern* was an attorney, he was indebted before his discharge on this very act of G. 3. 1769; he promised to pay that debt after his discharge; and concluded ignorantly in his count in the action brought against him, to the country and not to the court.

Serjeant *Davy* was then counsel; and was held by the court to have spoken the very sense of the act. On account of the informality of the plea, he said the defendant was concluded; but that the intention of the act being to relieve insolvents, was to be taken liberally, largely, and in its full extent; so as to discharge the person of the debtor of all debts contracted before the act.

The only question here is, the discharge of the person of the debtor, for the act does not discharge the debt; if the debtor is an honest man, he will give a written document of the debt, on which the promissory note was given to the trustee, for the benefit of *Elderton* and *Hall*; which trust the law will recognize, and not take it as a note to a third person in extinguishment: Nor can it be understood otherwise than the old debt, with a new promise; nor is the debtor to be taken to engage for more than payment, nor that he would surrender (or ought) his person to be imprisoned.

Judgment for the defendant.

Note.

Note. This was on demurrer, and the points on which Mr. *Hammond* argued, were, that the trust and note to a third person, for the benefit of the original creditors, was no extinguishment of the debt contracted before the discharge, under the insolvent act, and creation of a new one subsequent to the act: And that the person of the defendant was not liable, but discharged under the insolvent act. On these two points, particularly the second, the court grounded their determination.

Information.

The King *against* Wallis and Clarke, Bailiffs or Chief Magistrates of Ipswich in the County of Suffolk, and Others.

[38] **O**N the information of *Banford*, a coffee-house-keeper of *Ipswich*, for certain misdemeanors——

Banford alledged, that they had quartered nine soldiers on him, and three horses, for which he had no accommodation.

That *Wallis* had prohibited playing cards at the plaintiff's coffee-house; till, on advice, he was informed such amusements were lawful.

That *Wallis* quartered them out of malice to him; and that he has been a long time 47 l. out of pocket.

Stubbing, a brandy-merchant, in support of *Banford's* affidavit, says "that his trade is much discouraged; and that his customers "say, they must deal with the *Clarkes*, "*W.* and *J.* or they shall be ruined by soldiers quartered "on them."

Another deponent complains, that *Clarke*, on his representing the number of soldiers, desired to see the billets, and tore them.

On the other side, the counsel for *Wallis* and the *Clarkes*, alledged in their defence, from their affidavits, that *Wallis* being informed of an house encouraging gaming, sent for the person, who complained "that it was very hard; for "*Banford* had people gaming from morning to night:" That on this, a general order issued, to suppress all those houses, of which there are many. Afterwards, that going to *Banford's*, he was very scurrilously treated by *Banford's* customers, for interrupting their play. On which, he says, "he discouraged the house." That *Banford* came and

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complained of being over quartered, which *Wallis* denied, that he could bear it better than most others: That he found he was encouraged to fly in the face of justice, which he would not suffer as long as he acted as a magistrate; that *Banford* had been shamefully favoured, and that he should have his proportion encreased now. That he, Mr. *Wallis*, would afterwards have advised with all the justices, to see whether *Banford* was over-quartered; and that *Squire*, an Attorney on the part of *Banford*, said, he did not wish to proceed, and was satisfied.

As to the charge against *Clarke*, of tearing billets, the [39] answer given is, that it was to prevent men from getting billeted on three or four places at once, and contribution being raised accordingly. He denies *Stubbing's* affidavit, of the customers of *Stubbing* refusing to deal but with *Clarke*, on account of billeting soldiers: And refers to the register, that *Clarke's* trade has decreased since he was a magistrate.

It appears, I think, that there are one hundred and seven licensed houses in *Ipswich*.

Serjeant *Glynn* was on the same side with Mr. *Wallace*; and added, that he hoped, the rule against the defendants would be discharged with costs.

Mr. *Dunning*, for the informant. That the complaint is very serious; that *Wallis* resented his exclusion from a society, which he pursues now, as very pernicious; that *Wallis* did not usually billet there before; that the billets were usually signed by one justice, but this by two, in which *Wallis's* name was unnecessary. That the party in town were Sir *John Merdaunt's* dragoons, about sixty men and thirty horse, that there was at least one hundred and five licensed houses in *Ipswich*; and therefore *Banford* had more by much quartered on him than his due proportion; that the accommodations were not good, by Mr. *Wallis's* own confession, who says, "the house derives its profits, not from the lodgings, but from the company that comes to play there." That 'tis said, Mr. *Wallis's* conduct, if irregular and oppressive, is the first; that 'tis the first, is accounted for easily. 'Tis admitted, the lodging-rooms are just sufficient for the family only. The argument is, "you have not room for horses or soldiers now, but you may have both; the long room you use for unlawful games, and from which that profit arises which makes it fit you have so many men and horses, quartered on you, divide that, and make part into stabling, the other part for lodging room for the soldiers." Mr. *Wallis*, in his affidavit, explains his motive; "You have flown in the face

“face of justice; one of us must fall: I will level you, or
“perish in the attempt.”

As for the application to the justices, if any, that it was
set up for colour to ruin and destroy that house which alone
he wanted to destroy.

As to the dropping of the enquiry before the justices, it
arose from Mr. *Stanton*, one of the justices, telling him
“that their jurisdiction extended not to review.”

[40] They say, they had a desire of suppressing the amazing
number of these houses: Have they suppressed many? If
I am authorized to say now is none, their motive would
have appeared; if they had struck off more, they would
have suppressed those with whom they had no quarrel. As
for *Banford's* being the best house in the town, Mr. *Wallis*,
the defendant, says, it is not so in the lodgings, which are
allowed but sufficient for the family; but he infers the pro-
fits, from the gaming and extravagance which, he says, he
sees is carried on there.

Lord *Mansfield*—When application is made for an in-
formation against a magistrate, for partiality and corruption,
the whole case ought to be stated; for out of the whole the
grounds must arise, on which farther proceedings may be
granted or refused.

So vexatious a method of enquiry into the conduct of
men, exposed by their office to much misrepresentation, as
that which omits very material points, and rests on those
only perverted by false consequences which serve the prose-
cution, merits to be discountenanced. In the instance be-
fore us, *Banford* has been guilty of an attempt to impose on
the court. He states what may look like an intention of
overburthening him in *Wallis*, and omits the prior part of
the affair. A serjeant (it appears, at the coming out of
the state) and four men, were sent to be billeted at *Ban-
ford's*. Though the men were wet; though after a long
march, and arrived at night, in very bad weather, (in *Nov-
ember*) he would not admit them to the kitchen fire; but
turned them out to shift for themselves as they might be
able.

The serjeant goes and tells the magistrates their orders
were not obeyed. In the mean while a great disturbance
ensues, and a person who happened to hear it, begs for
peace, that some care might be taken of the soldiers.

Clarke and *Wallis* remove the soldiers to the *White Lion*
and the *Cross*. So far were they from malice to *Banford*,
that

that they shewed improper favour to him. Afterwards a man comes to the knowledge of *Wallis*, who kept a billiard table; he is summoned, confesses, and begs that *Banford* and many others may be put down, or otherwise he shall be ruined. On this the magistrates give a general order against all the licensed houses suspected of exercising unlawful games, and at unseasonable hours. Very scurrilous behaviour passes against *Wallis* at his coming into *Banford's*. *Squire* and another attorney tell him they wonder at the impudence and ignorance of the magistrates: That they were gentlemen, and had a right to play at what, and in what manner, they pleased. 'Tis said, and it appears likely on the face of the affidavits, that an association has been entered into, to intimidate the magistrates, and to support the prosecution.

Some time after, *Banford* has nine soldiers and three [41] horses quartered on him: He goes to Mr. *Wallis*, says, he thinks himself ill used in being burthened by so many. *Wallis* answers, "I do not think you are ill used; for "where the *Lion* and *Cross* have twelve, you ought to have "eighteen. I was much surprised to find you have been "shamefully excused these three years, from having any "quartered on you. You have flown in the face of justice "and the laws; to which I understand you are encouraged "by a set of dissipated heroes. While I act as a magistrate, "be assured, I shall support justice and the laws to my utmost: One of us must give way; and I will either make "you fall, or perish in the attempt." These words he used, or some to the like effect, importing a spirited resolution of maintaining the duty of that authority with which he was entrusted. A violation had been committed by *Banford* of the duty and respect he owed to the laws; and it seemed but equitable his proportion should be encreased, after he had warded the just burthen so long, and with so much contumacy.

Clarke has little particularly against him, except his acting with *Wallis*, in quartering the nine soldiers and three horses; (for what is said in the affidavit of *Susan Groves* deserves no attention.) It's true, the affidavit speaks, that for not dealing with *Clarke* she had been so over-run with soldiers that she was forced to quit her business and habitation; but she denies the truth of that fact, says she did deal with him, and that she was not overburthened; and expresses great concern, that she was deceived by the affidavit read to her,

in such a manner that she could not tell how to understand it.

A circumstance is mentioned, That a man came, who said he thought he had been overburthened; *Clarke* says, "I can't help till the next change of quarters; and then I will relieve you." The other then subjoins, "I have so little dealings with you, I hardly know how to ask you to subscribe to my bowling-green." To which *Clarke* replies, "No matter; I don't do for the trade, but I don't mind half a guinea: However, if I think of you, think of me." Is not this referred to the subscription, and the return he thought reasonable for it in the man's custom? Has it any thing to do with the quartering, and relief from that; which he promised before hand, as soon as it could be reasonably done?

I think, therefore, these ought to be discharged with costs; and if the answer of *J. Clarke*, did not appear ambiguous, together with another circumstance, I should think the same as to him. It appears, on being asked whether there were not lucrative profits, which inclined him to take the troublesome and unthankful office of billeting; certainly, says he, I confess.

[42] He answers to the charge of this conversation, that he never acknowledged the taking any lucrative profits.

What has more weight with me is, that a person thinking himself over-quartered, applied for a removal of two soldiers, and two other men, and bespoke some spirits; but not liking them, desired to change, and others were sent, which he and his companions complained of, and he bought no more; after which the men were sent back to him again.

I think, therefore, the rule against him ought to be discharged, without costs.

Note—In the case of *The King* against *Badford*, (the *Easter* Term precedent) this man had been proceeded against on three insinuations, for suffering billiards and other unlawful games. The man not summoned; the games not expressed, except billiards, which were laid as against the 30 G. 2. which was held not to extend, except to persons under particular descriptions; and billiards not taken to be within any other act, except (perhaps) the 33 H. 8, which inflicts different penalties from what were intended by the information, and subjects the offence to the cognizance of a different jurisdiction. This was the case to which Mr.

Dunning

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Dunning alluded; and the grounds of the court were on the irregularity of the proceedings.

Affault.

ON an action of assault, against some gentlemen, scholars of *Cambridge*, which stood for judgment, the court was applied to, in order to obtain leave that their personal appearance might be dispensed with; for that the assault was by mistake, and the gentlemen were very sorry.

Lord *Mansfield*—If the gentlemen are concerned, they would be sorry not to go before the master. 'Tis a very great offence, to attack a man in such a manner, under pretence of mistake. It seems as if they went with a determination to beat somebody. 'Tis a very great irregularity. If we don't admit the cognizance of the university, we must keep the peace in it. Make the rule to go before the master, with costs.

Note, This assault was committed, I think, against a person resident in the university, but not matriculated there.

Anonymous.

ON an action of assumpsit, against a tenant for neglect [43] to repair hedges, &c. the defendant counts, landlord did not assign timber for repair, nor was there any proper which he had a right to take.

It was held that this plea was bad, both in form and substance; for that, 1st, Defendant saith not, he asked the landlord to assign; which he must first do, and afterwards, on refusal, may take without leave.

Next, That by plea "none to which he had a right," he puts on the jury to determine on the matter of law.

Likewise, That for laying no venue, the count was bad.

Possibilities.

Anonymous.

MORE 176. Case of *Whitlocke v. Hardinge*, a lease by a joint-tenant, of a moiety, to hold after her death for sixty years, if the other joint-tenant should live so long, not good. This case was cited, to prove possibilities; but *Selwyn v. Selwyn*, by Lord *Talbot*, quoted to the contrary. But the court said, this was a case of vested executory interests.

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V. 2 Black-
stone 290. terefts. *Clarke v. Clarke*, 2 *Vern.* 223. was quoted. The court seemed to think, under circumstances, a possibility assignable, though in general, as a chose in action, not assignable.

The King against Hill.

ON an information in the nature of a *quo warranto*, to shew cause why he exercised the office of burghess of the borough of *Saltash*—

[44] Lord *Mansfield*—In 1757, an election was began; and adjourned, for a riot, to the 17th of *September*. 'Tis remarkable, that in the affidavit, Mr. *Mayo* complains of the delay designed to his prejudice, and declares himself elected duly; however *Hill*, was *de facto* elect. In 1759, to quiet disputes, both resign. The difference in the terms of renunciation is remarkable: *Mayo* resigns all claim; *Hill* his office. *Hill* immediately re-elected. The dilemma seemed good, on mature consideration, that the day, if good for the renunciation of *Hill*, was good for his re-election. Nothing has been stated in proof of a proceeding to poll in favour of *Mayo* the first day; if there had, something might have been; though in the absence of a returning officer, on account of a riot happening, there is no precedent of an election being held good. The only objection to the election, then, of *Hill*, must have been want of summons. The court cannot take that up without any suggestion of it from the parties; nor presume, after fifteen years acquiescence. Therefore we are all agreed, that the rule must be discharged.

Rex against Metcalf, Eyanfon, and Others.

To enlarge Judgment on a Riot.

THE court will not give judgment separately, when two defendants are included in the same action; unless cause can be shewn, why there's no chance of the appearance of one. But allowed that the others, against whom verdict had passed, and who were in *Yorkshire*, indigent people and miners, need not be waited for.

Metcalf and *Eyanfon* had a farther day to appear; after which they were ordered to go before the master.

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For a Rule to shew Cause against W. Esq. Justice of the Peace.

WH Y an information should not go against him, for not, in pursuance to an act of parliament, (the 19th G. 2.) paying in the poor's money raised by a fine, on certain persons convicted of profane swearing; and not returning the record of the conviction. Rule granted for enquiry of the justice; no notice having been yet given him, that a motion would be for an information.

King *against* Waller.

ON a motion, to shew cause why an order of justices of the peace, for removing the defendant from his office of clerk of the peace of *Middlesex*, should not be quashed.—

Mr. *Wallace*—The act of parliament gives absolute power, without appeal to the justices of peace, to remove or suspend any clerk of the peace, for any misdemeanor in the execution of his office.

In this case the charge is in writing, according to the act, and has five articles.

1st. Negligence; in drawing summary indictments, which [45] have afterwards proved defective.

2d. Neither attending at sessions himself, nor providing a sufficient deputy.

3dly. Entrusting the records of the quarter-sessions to a man's keeping in another county, whereby they could not be found.

4thly. Not attending, as his office requires, at the last general quarter-sessions, nor providing any to attend.

5thly. For taking extortiously, by colour of his office, the sum of 10s. 4d. of a certain person named in the charge, upon the commitment of a person for felony likewise named in the charge.

Of all, each and every of the misdemeanors, severally charged to every one of the articles, they find him guilty, and discharge him.

The matter in plea, in support of the rule, has been given, that some articles of the charge are defective. I affirm, that every one of the articles would have been good; I think, in an indictment: But the law would have been sufficient of itself, even without the act, at common law.

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However,

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However, it's competent to the sole discretion of the justices, whom the legislature have entrusted in this instance with the sole power to remove or suspend as they see fit, on the proving any single misdemeanor in the execution of office; if there be, admitting it, for the question sake, a defective or insufficient article in the charge, it will not affect the rest, nor can the order of the justices be set aside.

Mr. *Dunning*, to the same effect. Concluding, that he hopes what articles can, may stand; and what cannot, will be not entered, if the court be satisfied of the sufficiency of any one, for the obvious reason, That clerks of the peace will, to the full extent of their power be tempted to transgress or be negligent.

[46] Mr. *Eyre*, Recorder—My lord, I am not clear that the gentlemen on the other side will find it easy to prove any of the articles not sufficient, as charged, for misdemeanors. The quarter-sessions is judge as to the misdemeanors both of law and fact. The analogy is much greater between this case and an indictment, than an action on words; where, if a jury find their verdict on words, some of which are actionable, and some others not, (*vide* the case in Lord *Raym.* 886.) the whole is void, because the damages go upon the whole; but here each cause assigned stands distinctly as a cause of removal.

If it should be said, greater tenderness should be used, because the person removed loses his freehold: He took it subject to the conditions of the act; there was no freehold in the office before the act; but he was removeable by the *custos rotulorum* at pleasure.

Long before the making of the act in, *Cro. Car.* 436. negligence in a deputy, was sufficient to deprive of office by common law.

2 *Lev.* 71. *King v. Lady Broughton*, in escape; she having an office for life, as warden.

Negligence of her deputy permitting the escape; was a forfeiture of her freehold in the office, and subject to a fine. As to the charges—There's one indictment, without any addition; another of murder, without its being drawn with the words "feloniously, and of malice forethought." The records are of admissions of magistrates, whereby to prove their title to hold office. The other articles are sufficiently clear, allowed, and strong; and, as I apprehend, every one of them misdemeanors.

Mr.

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Mr. *Lane*—I am of the same side. The charge of drawing defective indictments may be thought a fault of the head only; however, it will not be questioned, I suppose, to be a misdemeanor. If here had been two or three it might be thought hard: But the instances are selected out of a great number.

The charge of not employing proper persons is of the same kind. I need not speak to the charge of extortion.

The fifth charge, of not attending by himself or sufficient deputy, I find, was taken ambiguously: But it's founded on the act of parliament expressly.

Mr. *Cox* began for *Waller*, but was desired to plead it the next day.

Mr. *Cox*, for the defendant—As we are to argue on an order made by the justices, for the removal of Mr. *Waller* from his office, much has been said what the justices may do: But I choose to argue on what they have done. I except against the mode of punishment they have taken upon themselves to inflict. The act gives power, on a charge in writing, to remove for any misdemeanor. The word misdemeanor is a word of law: And therefore is to be taken notice of by your lordships; who will see, whether by law the offences charged come under that denomination; in which I apprehend, is always contained some degree of guilt. The act has given great latitude of power: An hour's suspension, or an absolute removal for ever. I apprehend, that the legislature intended, by saying, as the act does, from time to time, that directly on a misdemeanor, without waiting to accumulate a great number of charges of different degrees and different times; and then exercise, at once, the full extent of their jurisdiction.

They recite, that whereas *Waller*, clerk of the peace, &c. has been guilty of all the misdemeanors, we do order that he be for ever removed from his said office.

It would be apparent in common parlance, that if it had been asked, why did you punish him so severely? the answer had followed, that for the number of misdemeanors contained in the charge, we think fit to exercise our full authority. If any of the acts charged as misdemeanors, be not, it seems clear that the punishment will be disallowed; the order having been made on offences of inferior degree, and such as reach not to that degree on which the order of removal must be grounded. I repeat, misdemeanor is a term of law, and which your lordships will therefore take notice of. A poor boy, *Charles Pleasant*, having received

Vide 4
Blackstone,
c. 1. p. 5.
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sentence before Sir *John Fielding*, for transportation for a fraud, for that he had passed a note which was false, the cause was removed hither; and the court was clearly of opinion, no fraud. [I suppose, because the boy was found ignorant of the note's being bad.]

As to the drawing of indictments, five are severally charged under one head; so that five misdemeanors are to be proved under that head:

1st. It's not the office of the clerk of the peace, who is only to return the records of indictments perfect into the court. Next, the legislature expressly calls the false drawing of indictments, mistakes; and therefore not misdemeanors. It may be said, the number will make the case worse: Five hundred are charged. I have nothing to do with matter out of record, five only are stated. In an indictment of bigamy it's drawn against the peace of our Lord the King, when the offence was in the last reign; and whether the offence did not continue, has been long matter of serious discussion by men of very considerable abilities.

[48] In that of murder, feloniously, &c. are omitted. It may be neglect; I submit, it's nothing worse. And the record takes no notice that the indictment was not drawn again; and therefore it will be taken of course for the defendant. In that of burglary, the offence is charged, that he drew "*A.* broke into the house," without saying "entered." Who can say, his instructions were not so? Addition was not inserted: There's no damage proved to the public; it's not pretended the party did not come to his trial. If within three years they find five out of about two thousand four hundred indictments, Mr. *Waller* deserves commendation, for his astonishing accuracy in making so few errors. For the charge which accuses him of not attending, nor providing sufficient deputy: Besides that it does not speak to times, it does not say that some friend did not provide one for him. With respect to the seven records removed, (if they deserve that sacred name of records,) nothing of that nature can be more insignificant: 'Tis not maintained, 'tis his business to keep the records in the county. I know not that it is a misdemeanor; but, admitting it to be so, the charge contradicts itself. They don't directly charge his taking the records out of the county; it says, he took seven; they proceed to add, they were kept out of the county by Mr. *Waller*, and that so negligently, that they could not come at them: And yet these

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these very persons, Mr. *Waller's* enemies, bring all the seven into court. They say they were kept out of the county for twelve years; when 'tis admitted, on all hands, Mr. *Waller* has been in the office only eight. To the last, I answer; to the second, it's too indefinite to admit of any defence, or to convey the least shadow of certainty, what sort of crime is intended. I hope your lordships will, therefore, not suffer so vague, accumulated, and, I presume to say, illegal a charge, to establish so severe and irretrievable a penalty on the unhappy object of its attack.

Mr. *Mansfield*, to the same effect. Towards the end—The charge of misdemeanor by extortion, the only charge on record which I take to be legal, is a charge containing so different degrees as to the oppression of the party, and more general injury to the public, that of all charges, it should least have rested, with all its ornamental expatiations, on intendment or supposition: However, if one of all the articles of accusation be insufficient, the whole, I apprehend will be vitiated. Though there are many *dictums*, that orders are to be beneficially construed, I understand them as to the form, is to the substantial part; I take it, they must rest upon the same ground as convictions do. Though there's an instance in *Strange*, which would astonish one, if one did not know the jealousy entertained of the conduct of inferior courts: An order to remove a pauper; the order was quashed, because it's said to be made in a session held on an adjournment, without stating, that the session was held within the statutable time after which the adjournment was duly made. As such a power, by the statute under which the justices were empowered to act, is entrusted to the justices, as I know no other instances of in that magistracy, I trust intendment and supposition, and an order so informal and insubstantial, shall not deprive Mr. *Waller* of a very valuable freehold. *King v. Raynes*; an order, in a report in *Raymond*, was set aside for extortion, (to wit) that he took, by colour of office, of *Langborne* (a labourer,) a certain sum named in the order; then they charge another extortion; and it was not specified that the extortions were committed in the county for which he was clerk. And though the justices, in their judgment, declared they removed him for the offences above specified, offences in the execution of his office; yet the order was set aside, after an argument first here and then before all the judges, on these subtle objections, which seem merely to affect logical or grammatical nicety. But those sages of the law

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law thought intendment was not to be admitted where a summary process is granted, to deprive a man of his freehold, without a jury. No injustice can be done by setting aside the order; for if there be any extortion which occasioned the justices to see cause for the removal of Mr. *Walker* from his office an order will recommence, and finally be effectual to remove him.

Mr. *Davenport* to the same effect--As to the extortion 10s. 6d. is particularly charged: There was a reason for this; it is upon a commitment for felony, for taking lead off a dwelling-house. This is made felony by a particular act of parliament; in the old table of fees 10s. 4d. stands as a fee, as for trespass. If by indictment before a jury this had been brought in evidence, it would at once have removed the charge of extortion. The justices saw this, and therefore, they neither left it to be tried that way, nor laid it separate, "*juncta juvant*;" it's impossible, say they, but he must sink under one or other of the charges. For this fault, so material in the far most important part, if not the only one in the order, I hope the order will be set aside.

I was prevented by a sudden fit of illness from attending; but I learnt from a gentleman of *Lincoln's Inn*, that the order was confirmed.

Hunter against Lord Deloraine.

ACTION on the case; demurrer to the declaration, because Lord *Deloraine* was summoned.

It was held by the court, he could not be summoned, being a peer; and that the court would take notice of his peerage, without its being pleaded.

Venue.

ON an action of debt, by the Company of Chandlers and Soap-makers in the city of *Bristol*, against one of the body, for keeping more than the due number of apprentices, on the statute of *Elizabeth*.—

[50]

It was alledged that the juries of the city of *Bristol* seemed inclined to discourage prosecutions in restraint of trade, and that several indictments had been thrown out; and that they believe there is not sufficient impartiality, and therefore pray to change the venue to *London*, and that it may be tried by a *Middlesex* jury.

Mr

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Mr. *Lucas*, against the rule—'This general suggestion is not sufficient to support the rule; the matter is between the company, and a member of their own, for keeping more apprentices than allowed. Therefore, no stranger being party on either side, the disposition to discourage seems to have no room to operate, supposing it to exist.

The indictment must have been on the statute of *Eliz.* and therefore the throwing it out, concerned not them as a corporate body, it not being on a bye law of their own. Therefore, I submit to the court, that the rule for changing the venue be discharged.

Mr. *Buller*, on the other side—In the case of *Mylock v. Saladine*, (*Bur.*) a suggestion of general partiality produced duly before the court, by affidavit, was held sufficient; and, ^{4 Bur. 1564} as is now desired, it was allowed to change the venue. And the cause suggested was the same merely as here; an apprehension that a fair trial could not be had, proved by the throwing out an indictment.

Lord *Mansfield*—You are right, Mr. *Buller*, in the case cited, but the application will not coincide, though you have supported the rule very well; but the throwing out of the indictment is not proof of inclination to discourage. The matter arose on the statute of *Eliz.* to which many have a dislike. The matter is a small, probably, (from one of the like nature, I remember to have tried) not above 10l. and for that reason, the grounds should have been very full.

Not in transitory only, but even in local actions, this court will certainly order the venue to be changed, where there is a *dignus vindice nodus*; but not otherwise, by any means.

Hodges against Lovat.

TO recover the penalty on an usurious contract, on an action brought within a year from *October 1770*, on the statute of *Queen Ann*, against usurious contracts. Vide 12 A. ft. 2. c. 16.

Contract made in *October 1768*, but no money paid till 1st *October 1770*.

It was contended by counsel, that the contract was only void at the time, but not liable to the treble penalty till the time of payment; therefore, there was a cause of action within the time limited by the statute. *Loyd v. Williams*, was on contract for 100l. for three months, 6l. was usuri-
ously

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ously paid at the time of the advance, and the principal paid back at the end of the time. In that case, the money on the usurious contract was paid on advance, at the commencement of the contract, and the principal only paid back afterwards.

Mr. *Buller*—I hope the whole cause of action was the usurious contract itself, and which must be proved to have been within a year.

There is an opinion of Baron *Manwood*, *Cro. El.* 20. *Malory v. Bird*, If a man, contrary to the statute, agree to take 20l. for the loan of 100l. if he take nothing, he is not liable to the penalty; but if he take a shilling, he is; not the money was necessary to be taken, but something to bind the contract. Now the negotiable promissory note given on the contract binds it, and no more is requisite. In bribery, the agreement is sufficient, without any thing given. The plaintiff having declared on the contract must prove it within the year; though, otherwise, he might have gone on the receipt of the money.

Mr. *Cowper*, in replication—I beg leave to offer in reply; Mr. *Buller* has said, that we declared on the contract, and therefore are barred from plea grounded on the payment. We declared on the usurious taking of the money the 5th of *October* 1770, in consideration of the usurious contract.

Mr. *Buller* has quoted a *dictum* of Baron *Manwood's*, which I think does not affect us; but only prevents our declaring on the contract merely, without counting on the payment made on the usurious contract.

In the case of bribery, the crime of the party who is to be punished under the statute, is complete from the agreement, though nothing should be received.

Lord *Mansfield*—I think Mr. *Cowper* is right in his argument as to the time of action, for the parties to these usurious contracts being pressed for a little money, don't except to the terms, till the day when payment makes them smart. So that, if the cause of action did not arise from time of payment, it would in a great measure defeat the statute.

Horam against Lazarus.

[52] **O**N a motion of Mr. *Dunning* to make a rule absolute, which had been given to shew cause why the surplus on

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on a *testatum fieri facias* should not be repaid to the defendant.

On the affidavits, it appeared, that the debt was 30*l.* on which, the evening of the last day of *Michaelmas* Term, the writ issued. If the sheriff comes to the house to execute the writ; the debtor desires the execution may be delayed; the sheriff refuses it, because he should be liable, the writ being returnable the next day: But they agree together, that if *Lazarus* can on that day raise the money to the appraised value of the goods, he shall have them then.

The next day the goods are sold under the execution for 40*l.* 12*s.* *Lazarus* some time in the day brings to the office 80 guineas, and being told the goods had sold for 51*l.* he leaves the 30 guineas, and claims return of his goods.

The sheriffs, however, refuse to return the goods, as the money paid in fell short of the appraised value; nor is the money returned.

The court, on hearing the argument on both sides, is of opinion, the hastening the execution so violently, by colour of return of the writ, is by no means commendable; nor the detainure of the entire goods, when the debtor had raised so near the full value.

Therefore, that the rule for the defendant be enlarged for the present, and that on repayment of the 30 guineas it be discharged, without costs.

Anonymous.

SUIT by special original, for a debt under 10*l.* thrown out, as being bad by the statute.

Bankruptcy.

Anonymous.

ON a commission of bankruptcy, the commissioners have full right to enquire, whether one who comes in to prove his debt under a commission, means to proceed at law.

Ejectment, fraudulent.

Anonymous.

IF a declaration in ejectment be served, and the parties to the ejectment, or any of them, ask what to do with it, [53]

it, and whether they are to shew it to the landlord; and answer is given by him who serves, 'Tis only a form of law that he leaves it, and that it signifies nothing to them or any body; possession on that ejectment is not good. A clerk who drew the notice of ejectment, being asked by a person who claimed under the landlord in possession, whether any thing had been done in the ejectment, swears that the question is impertinent; and therefore continues the conversation he was in with somebody else, waiving any answer. This was held by the court a fraudulent scheme to procure possession: And Lord *Mansfield* set aside the rule obtained upon it; observing, **NOTHING WAS SO SILLY AS CUNNING,**

The King *against* King.

ON an inquisition taken before Alderman Kennet—
A motion to set aside the inquisition for irregularity.

Vide 5 R.
2 ft. 1. c. 8.

Corbett let a shop to a person who had a mind to leave it without notice, but was told, that by the custom of *London*, half a year's notice was expected; another person admitted tenant, who used the shop, but going out one morning, upon his return, found a padlock on the door, which he took off. A person enters upon the shop, as by virtue of an assignment of the term from the original tenant against whom the plaintiff sues; and thereon an inquisition is taken, against which exceptions were made, on the ground of irregularity in the original proceedings.

Objection to the count that Mrs. *Corbett* as sole shop-keeper sues by the custom of *London*; and that no such custom was before the court to take notice of.

That the venue was ill taken, being taken in a part of *Fleet-street*, which is a place large enough; and that it should appear in a part nearest the premises.

[54] That there is no issue properly joined; for that the defendant denies the count, and says that he entered duly under *Corbett's* lessee. Mrs. *Corbett*, who was plaintiff, replies not; but *Woodfall* obtrudes as prosecutor for the King, and denies nothing, but only prays, as the plaintiff, that it may be enquired of the country.

The court was hereupon moved, to quash the inquisition.

Mr. *Buller*, on the other hand, That the case being settled by his consent, he expected no more objections than he was prepared to answer—

That

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That Mr. *Murphy* was present, [at taking the inquisition] and made no objection to the interest not being stated as of freehold; which was another of the objections made.

That the court below was to take notice of the custom, without pleading, it being their own custom.

That the venue was taken from the neighbourhood, which from the definition itself appeared to be sufficient. Vide 3
Blackstone
294.

That as to *Woodfall* coming in as prosecutor for the crown, without shewing how, it's mere form; and there are two cases of Lord *Hale* [which he cited] to prove it is not necessary he should shew how he comes in.

Mr. *Murphy*, in reply, observed, that the cases alluded to by Mr. *Buller*, were in one instance of a city court taking notice of their own custom; but that this did not extend to a justice under an act of parliament, though he might be an alderman. And as to *Woodfall*, though in the other case of Mr. *Buller*, the court of King's Bench took notice of their own officer, the master of the Crown-office, as a proper person to prosecute for the King, yet it would not extend to this case.

It stood over; but the court seemed inclined to discountenance the objections, as formal, 1 *Roll's Rep.* 105. was quoted.

Settlement.

Anonymous.

THE court seemed of opinion, that from statute-fair, to statute-fair, was a sufficient hiring for a year to gain a settlement.

The King *against* Skinner.

ON a motion to quash an indictment against—*Skin-* [55]
ner, Esq; one of his Majesty's justices of the peace of the town of *Poole*, for scandalous words spoken by him, in a general session of the county; in which he said to the grand jury, "you have not done your duty; you have disobeyed my commands: You are a seditious, scandalous, corrupt, and perjured jury."

Serjeant *Davy*, in support of the indictment—That it was of high importance. They who are one of the chief pillars of the constitution should not be thrown into open contempt.

An

An action by any one separate would not be good, because the offence is not against *Peter, John, &c.* in their several and sole capacities, or any of them, but against them as one body, as a grand jury; and neither could they sue jointly, because they are no corporate body. A remedy by indictment is proper and necessary; it's the only one they can have; it's the natural and usual process in a crime against the public.

If it's refused, it will be equivalent to saying, These very men should have taken their remedy at law as private individuals, had a particular affront been given to them; but as a grand jury, (where the insult is vastly more material,) they must be attacked with impunity, and shall have no relief; nor the public, who suffers by the indignity done them.

Mr. *Lucas*, against the indictment—That it was a very new and singular proceeding.

If the words were not spoken against the jury in the execution of their office, they are not words liable to an indictment; and if they were spoken, while they were sitting in the execution of their office, the judge was so too in his: And the principle is clear, that a judge of a court of record is not liable to an indictment for words spoken by him, sitting as judge; especially, because it is not impossible to conceive the existence of a corrupt jury: And if the charge was true against them, shall Mr. *Skinner* be subject to a process, in which he would have no power to justify, for the truth of the words spoken? 2 *Strange* 1157. *The King v. Pococke*, on words spoken by the defendant of *Kent*, a sworn justice, saying “He is sworn, and is a knave, and “forsworn;” agreed that it was not actionable, because spoken with reference to a matter past, and not spoken against him in the execution of his office. 12 *Mod.* 98.

[56] It would be impossible the authority of a judge could ever be supported, were they liable to the suit of any person, for words spoken by a judge as such.

Lord *Mansfield*—I am willing, as neither Serjeant *Davy*, nor Mr. *Buller*, find any precedent in the History of *England*, for an indictment of this kind, to give them time till next term to find any.

What Mr. *Lucas* has said is very just; neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt, and examine on

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on information. If any thing of *mala mens* is found on such enquiry, it will be punished suitably.

The words are extremely improper. If the party were not a borough justice, I should think there might be grounds to apply to the great seal to remove him from his office. But to go on an indictment, would be subversive of all ideas of a constitution. If any precedent should be found, you should have time to make use of it; otherwise it would be proper to quash the indictment immediately.

Dodd *against* Innis.

In Arrest of Judgment.

ON an action for breach of covenant. The cause of action was on a lease, in which lessee covenants with lessor, to leave sufficient compost on the soil of the land, at the end or sooner expiration of the term, the lessee having the yard, barn, and a room to lodge in and dress diet.

Upon these words of the lease, the defendant pleads, that he did not covenant; but that there is a condition, if the lessor gives room for corn, then the lessee shall have compost.

Mr. *Wallace*, on the other side—"Tis very extraordinary, Mr. *Innis* should not demur to the declaration of the plaintiff, but wait till verdict went against him, to enhance the costs. 'Tis true, the lessee covenants and agrees to and with the lessor, and yet the covenant is contended to be on the part of the lessee only. If the words had been, *should have*, or *shall have*, the covenant could not have been questioned. I trust, the word *having* will be quite sufficient for the same purpose.

In replication, for the defendant. Mr. *Wallace* has objected no demurrer to the declaration. Mr. *Innis* was conscious of its being a condition, and therefore rested the matter of fact with the jury; and had it not happened, we had but three gentlemen on the special jury, probably the cause would have gone no farther. 'Tis plain, the jury gave a verdict that must be ill grounded; they gave one shilling damages, which, if any damages were incurred, must be vastly incompetent.

The plain intention was, that the covenant, which we call a condition, was for the advantage of the lessor; who, if

if he thought proper, might have the compost, on furnishing the room, barn, &c.

Mr. *Dunning*—It cannot be doubted, both from the words and sense, I think, that the lessor meant to leave himself at liberty, as in terms he has done, to give him the use of the barn, if he inclined to take the benefit of the covenant.

Mr. *Bearcroft*—The expence of a special jury was incurred by the defendant, that the tenants might not determine between landlord and tenant; however, he could only obtain three gentlemen, and the rest were tenants.

I don't think law cases are necessary here, but the plain common sense of the words.

Lord *Mansfield*—The argument of Mr. *Bearcroft* is a very good one: and I am glad to find there's such perspicuity in language, that there was learning wanting to raise any difficulty in the matter. The parties had none; they were plain sensible men; accordingly, they put the issue on the fact. "You did not give me room to bestow my straw, &c." said the tenant. "I did," says the lessor. Can there be any thing clearer, than that the covenant could not be to reside in the breast of the landlord, to make election during any part of the term? Had it been so, the tenant bestows his corn and straw, houses his cattle, &c. and then comes to the landlord, and says, "I don't want you to furnish compost; and that being the condition on which you was to lodge your corn, and have the other benefits expressed; take your corn, cattle and straw, and carry them where you think good." Where the tenant covenants to repair, if the lessor finds sufficient timber, the proviso restrains the covenant: But in this case there is not the least foundation for such construction. Let the rule in arrest of judgment be discharged.

Davis against Taylor.

[58] ON a motion to make a rule absolute, for putting off a trial—Mr. *Jones*, in shewing cause against the rule, alledged to the court, that it was a case on an action against a surgeon for unskilfulness; that the declaration was entered the last term, and the matter was duly set down for trial; but that, on suggestion of the absence of a material witness, proceedings have been staid. That it is a scheme to delay till the sittings in *Michaelmas* Term; and therefore

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therefore, as they might have had their wishes, that he hoped the cause would go on immediately.

Mr. Cox—That there was a material witness; and that the plaintiff would be ready to try the cause the sittings after term.

Lord Mansfield—You gave notice; why did you venture so far, when you had not your witness?

Mr. Cox—We were disappointed of him then, and are uncertain whether he can come before *Michaelmas*.

Lord Mansfield—And yet offer to try it the sitting after term! Palpable subterfuge upon the face of the motion.

Mr. Cox—My lord, we could be ready to try it, rather than delay till the next term; but we would like the probable chance of getting him by a short stay.

Lord Mansfield—It's an exceeding oppression and vexation of defendant's; this contrivance practised, of putting aside trials from term to term, by the court's relaxing its practice, has gained greatly too much ground. All the inconveniencies the act was designed to stop will recur, if any slight causes be allowed for enlarging time after notice given of trial.

Notice Irregular.

A Notice having been served on a rector of *Wales*, in a writ of *latitat*, on suit of a curate, to bring him into court, to answer for non-payment of six years and a half pension, for service of the cure, at 12 l. *per annum*; on return in court, it not appearing the name of the attorney of the plaintiff had been inserted, the rule was obliged to be discharged, but without costs. Lord Mansfield deciding, if there had been a possibility of supporting the rule, he would have taken an advantage of a straw.

Motion to dispense with the personal Appearance of certain *Cambridge* Scholars.

On Judgment to be given on *Assault*.

MOTION to dispense with their personal appearance, on account of their being in *Ireland*; of which they are both natives, and have considerable connexions there. Prayer, that a fine may be accepted, on a suggestion that their presence would be to no purpose, as the

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the court would see no grounds for punishment by way of example.

Mr. *Dunning*—It seems extraordinary, it should be desired persons should be dispensed with because they are in *Ireland*, when they ought to have been here. The truth of what Mr. *Pemberton* asserts is foreign entirely, as it seems to me, when they have pleaded guilty, and from thence become subject to judgment. If they thought their case was good, they had nothing to fear. I can't conceive why, immediately on having pleaded guilty, they should withdraw themselves.

Mr. Justice *Aston*—In *The King v. Harwood*, a very aggravating case, it was long argued, whether, on affidavits, appearance should be dispensed with; and the gross abuse of his office as justice of peace, was the cause on which it was refused to dispense with appearance.

Lord *Mansfield*—If from the nature of the assault you have any aggravating circumstances to prove by affidavits, we will grant you a rule to shew cause; otherwise, their age and situation are sufficient cause why we should not bring them, at an expence greater perhaps than the fine the court would see fit to adjudge, to gratify the prosecutor, by exposing them in open court; especially, as they have in some manner atoned for their misconduct, in pleading guilty. A very small cause, on a common assault will be allowed to discharge personal appearance: Would not the court have dispensed with the rioters last term, if the fine had been undertaken? Rule to shew cause.

The King against Plumbe.

ON a rule to shew cause why a *certiorari*, by which a cause had been removed from the court of the mayor and aldermen of the city of *London*, on a plea of certain franchises, should not be quashed.

This case had been argued the preceding term by Mr. *Wallace* and Mr. *Mansfield*, against the rule; Mr. *Dunning*, for the rule.

Mr. *Wallace* argued, on the ground of the authority of the court over all the inferior jurisdictions in the kingdom.

He farther argued, That till after the return of the writ, the court of King's Bench never stopped the *certiorari*, on a surmise that the court below had a right to a *precedendo*.

[60] Several cases were cited, in which the *certiorari* was sued out of the court, and return made of the writ; in which it

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was held here, that disfranchisement was not lawful for words.

Mr. *Mansfield*—The question is not whether this court will ultimately take cognizance of the information, nor whether it can, against the mayor and aldermen; but only whether the court will not examine the information? whether not see, if there be cause of the disfranchisement; or, on the contrary, no cause being seen, will not at once end proceedings here, or any where else?

Mr. *Dunning*—It has been said, that a *certiorari* can never be quashed till after return; in most cases, I conceive, it may be more properly before. The case of the city of *London*, different as in many respects from other corporations, is in this perfectly the same with all others; therefore the jurisdiction of this court, if it grants a *certiorari* in this instance, cannot refuse to the meanest corporation. This court has no jurisdiction to disfranchise the members of a corporate society. Let it be supposed, your lordship should think that the disfranchisement was good, or the other way; your lordship could not, nor would stop the proceedings below. It would be very convenient, were it lawful, in a thousand instances, to bring the cause hither to get an opinion: But the law has no notion of such convenience. In this state of the business, it is not competent for this court to give its decision. I believe, the carrying with them such a direction, would be very convenient to parties: But I hope it has never been found necessary, nor will at this time, in this place, be judged competent.

It has been hinted by Mr. *Wallace*, as if the court below had no authority to proceed. I am confident, 'tis impossible they should be more irregular than they would in setting out here. The cases stated, as far as they went, seemed for a *certiorari*; but on farther view it appears, that in one of the instances particularly, the party was imprisoned by the court below after disfranchisement for words. I mean not to contend, nor I believe will any body doubt, that a writ of *habeas corpus* will go forth from this court, when a man is deprived of his liberty. In another, they had passed sentence of the fine. This is not a charge under a general criminal jurisdiction, nor an offence by the courts of the common law; it is one of the corporation in itself. It were indecent to have the disputes liable to arise on an opinion given by this court, interposing unnecessarily, and therefore improperly. As to the right of disfranchisement, the mode, and several circumstances flowing from the proceedings

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ings in the court below, when the judgment of the court below goes on either side; this court, on application of either party, will judge the matter of law, and of the right of the corporation.

[61] I cannot imagine why application should be made in 1772, to bring, irregularly, a cause before this court, which, if any dissatisfaction is taken on the inferior judgment, will come regularly hither; especially, when the whole effect to be had would be, the fetching papers up to be sent down again precisely in the state they came.

Till some act has been done injurious to the right, by disfranchising; to the property, by setting a fine; or the person, by imprisoning; I am satisfied your lordships will not interpose. All the cases cited, or that can be cited, I am positive, fall under one or other of these three descriptions. Has there been any instance, where on a mere complaint a *certiorari* has been established? This is merely such a complaint of a corporate body against a member of its own.

The court denied a *certiorari*.

Lord *Mansfield*—Though no precedent of a *certiorari* quashed before the return, yet there can be no reason against it, in case the writ should not have issued. *Bur. Case of the Quakers*; as title was not judged in question, the *certiorari* itself, after the return filed, was quashed; and a *superfedeas* issued against it.

The writ of *certiorari* not being a ministerial writ, but a prerogative writ, as *mandamus*, *habeas corpus*, &c. must have proper foundation on an affidavit, or on the face of the writ. In courts not superior, but such as this court will pay a proper deference to, there is a most absolute necessity not to interfere with their proceedings, without full cause. Let us consider to what effect it would be: Not to try the franchises; for nothing is there in the writ or application of parties, from whence we can take cognizance. No information of mistake in law, or any other particular, on which to remove the cause. To view the proceedings, and send them back for decision, would be nugatory. Four cases only in an hundred years; *Rogers*, for words and an assault; a *certiorari* issued, and afterwards a *procedendo*; though, in an assault, this court has certainly a concurrent jurisdiction. In that, and all the other cases, no effect followed from the *certiorari*; therefore, we all agree, that the *certiorari* be quashed.

The

The King *against* Backhouse.

IN an arrest, the officer apprehending difficulty in executing of the process, made a pretence of a note, which the defendant to this suit said he should be glad to see. With some difficulty, he was let in; and comes up to the defendant, and tells him he has a writ to execute on him for 40 l. And *Backhouse*, much enraged, said, his house [62] was his castle. That then the bailiff said it was very ungentle; on which, *Backhouse*, (the officer says, and the other officer who stood without and saw the bailiff running) aimed a pistol at him. On a trial, the jury find *Backhouse* guilty. This motion being after a verdict, no evidence as to the fact of the assault was admitted; but on its being shewn to the court, that the man was a bankrupt, on affidavit; with confession of the party on the trial, that he would charge an assault on the whole family; which he did, by swearing before a justice an assault to the father, having made his first complaint against the son only; then, before the grand jury, he added the mother.—On these grounds, and a probability found that the supposed pistol was a sugar-hammer, and that the officer who swore to the arrest was intercepted, by a passenger standing before the window, from seeing what passed, the injury and prevarication of the action, the inability of the defendant to pay any large pecuniary penalty, and the gross absurdities in many of the most substantial parts of the evidence, it was prayed in arrest of judgment, that a very moderate fine might be imposed.

Mr. *Wallace*—If apprehended or real bankruptcy be admitted, the execution of justice will become impracticable. I therefore hope, as the jury have found the defendant guilty, though they have acquitted all the rest, the court will subject him to costs, and a satisfaction, to check so unwarrantable a resistance for the future.

Lord *Mansfield*—By all the evidence on the trial the defendant was most clearly guilty; they all agree as to the bailiff's running out; (whether what *Backhouse* used against the bailiff was a pistol or a hammer, the bailiff was greatly intimidated, and, at least, took it for a pistol.) The precedent is an extreme bad one, of suffering offences of this nature to escape slightly; he must either compound by his friends, if they will undertake as suggested, or suffer corporal punishment.

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Mr. *Wallace*, counsel for the prosecutor, accepted one guinea; with costs to be taxed by the master as between attorney and client. The court, on undertaking by the defendant to conform to the terms, set a fine of one shilling.

King against Davis.

FOR a rule to shew cause why an information should not issue against — *Davis*, Esq. a collector of the customs, and justice of peace, for sitting as one of the justices under the statute of 12 *Ann*, c. 18. to estimate the salvage of the vessel; of which salvage, by the act, he was entitled, as custom-house officer, to a part.

[63]

Brery, a fisherman, claimed 50 guineas for salvage, which *Williams*, the owner of the vessel, refused; and said, that he had not been run aground, but by *Brery's* man. On this, *Brery* applies to Mr. *Davis*, for a detainer of the vessel, till the owner, Captain *Williams*, should answer to the claim of the salvage. Mr. *Davis*, being one of the three justices of the counties adjacent, sat to try the question of salvage between the parties. It appearing before them, upon examination, that the schooner was worth 9000 l. and the smack 300 l. that the former would have perished, after quitting the trackled, had not the smack, at the peril of itself and crew, saved it; the other side giving no evidence, they decided for the claimant. It's objected to Mr. *Davis*, he refused Mr. *Clement*, a justice of the county, proposed by the master. There's a clause, it was argued, in the act, which prevents his being proceeded against by information; because, on conviction, it subjects him to a considerable penalty, forfeiture of office, and incapacity of acting as justice: And 'tis hoped, this court, after forty years in office, will not, without accusation, subject him to an information.

On the other hand, the objection against Mr. *Davis*, that he should not have been the justice, but was to have appointed one, was argued.

The court was of opinion, that as the act, on dispute, empowers the parties to three justices; therefore he was not to appoint himself, nor exclude the other side from appointing, as by the affidavits it's proved he did; especially, as he took a bond of indemnity for whatever might be the consequence of the matter between the parties, and as a satisfaction is granted to the custom-house officer under the act.

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The court therefore of opinion, that the rule should be made absolute.

Lincoln, a man belonging to *Brery's* vessel, swears, that *Brery* would have perished in steering towards the schooner, had not the wind turned the sail round.

The court thought the award of the custom-house officer a very reasonable one; who said, that had half a guinea been agreed, a guinea was merited. And they were of opinion, the difference about the danger of the vessel would not entangle the question. So that the ground seems to have been by no means the unfairness of the decision, but the great impropriety and irregularity of his sitting as judge, who, as custom-house officer, was to take benefit of the value of the salvage.

Tuite or Chote *against* Fawkes.

ON a rule to shew cause why an information should not [64]
be granted against the defendant, for forcing the plaintiff to sell cheese at three pence *per* pound, by menaces —

Chote, by his affidavit deposes, that on the 10th day of April, a riotous assembly happened at *Dunmow* in *Essex*; and people came, to the number of fifty, threatening him, and so compelling him to sell butter at 6d. (he dwelling then at *Benton*, two miles off *Dunmow*,) and cheese at 3d. That a day or two after, *Charles Fawkes*, a considerable innkeeper, who had been strolling about the country, came and ordered a cheese at 3d. *per* pound, which *Chote* said he could not afford. *Fawkes* persisted urging him, and asked him, in a menacing way, "Only say you won't;" and intimated, that if he did not, other people would come and sell it for him. And that, in fear of having the mob on him, he was obliged to sell. And that *Gibson*, a labourer, servant to *Fawkes*, came soon after; and, he says, that *Gibson* had a cheese at the same price, from the same apprehension, that he was employed by *Fawkes*.

Fawkes deposes, that the riot was first discovered by him, that he had as much cause to dread it as any body; that he gave the first notice of it; and verily believes, he was principally instrumental in suppressing it, by telling people, invited to join the mob, whom he had constantly employed for many years, that he would never more employ them if they did. That several of the most considerable tradesmen, in order to quiet the mob, he is informed and believes, caused it to be proclaimed by the common cryer, that they
would

would sell their cheese at 3d. *per* pound ; when he did, as well as many others. That he went to *Chote*, not using any menaces, or saying that he would sell for him, or any thing to that effect or intent ; and that *Chote* readily consented. And says, that he made the bargain, not out of malice, on a view to take advantage, but thinking it the fair price of the cheese. And that the mob was dispersed two or three days before.

Others of *Dunmow*, on the part of *Fawkes*, made oath that *Fawkes* was a considerable innkeeper, and had no interest in their belief, to encourage the mob ; but on the contrary, out of a good intention, gave the first intelligence that the mob was dispersed two or three days before. And that they believe the price was fair ; and the information out of a malicious and wicked design.

[65] Observed, against the rule that *Fawkes* is not mentioned in the first riot, nor any thing about him ; that he is brought in after by *innuendo*, so as to involve him in an odious imputation, without the least particular assigned as ground : And that the whole charge is as positively denied, and as fully, on the one hand, as it could possibly be charged on the other. On which grounds, from the insufficiency of the proof, and the strong appearance of malice on the plaintiff's affidavit, it's desired and hoped from the court, that the rule be discharged.

On the other part it was urged, That *Fawkes* spoke to a proclamation which he believes to have been made, without saying of his own knowledge, or producing a single witness to so public a fact : That affirming it was done to pacify the mob, he nevertheless applies to *Chote*, out of the limits of the proclamation, two miles from *Dunmow*, and not any of the tradesmen of *Dunmow* : That the price for which the cheese was sold is confessed by both their affidavits, and gives very strong presumption, if no other part corroborated, of the truth of the fear and menaces alledged by the plaintiff.

After hearing this contradictory evidence, the court discharged the rule.

James *against* Penrice.

ON a rule obtained to shew cause why action should not be staid, on account of defendant being become a bankrupt ; the motion was objected to, because it might have

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have been litigated upon a plea, and that defendant means to litigate it.

Rule discharged.

ON a motion, that cause may be shewn why a writ of enquiry should not be executed here, in *London*; in a case of a clerk, to determine what was due from his master to him: On suggestion, that the jury at *Guildhall* would be of low and indigent persons, and not qualified to estimate where the matter might be of some hundreds.

Court—No colour.

Lady Mayo's Case.

TRANSFER of monies in the Bank, in the name of a feme-covert, made by the husband; which monies, it was suspected, she held by virtue of a trust to her own separate use. A memorandum was made by the Bank, on transferring the stock, of a defect of title suspected. It was held, that to make a memorandum on transfer of stock, signifying a flaw suspected in the title, must not be allowed; nor will any secret trust, as against the party who has open legal title, affect the Bank. And Lord *Mansfield* added—I won't say a word against the holder of the stock having his action against the Bank for disparaging his title.

[66]

Curia Cancellaria, at Lincoln's Inn.

WHEN there is a real estate of 1200l. value, debts on bond to 1000l. and on simple-contract to 1000l. more; all that can be done is, not to let the bond-creditors in upon the personalty, but the simple-contract creditors cannot touch the 200l. surplus of the realty.

Simple contract creditors cannot come upon the real estate.

Tythes.

MODUS set up since the 13 *Elizabeth*, binds not the successor.

A peremptory composition requires notice to determine. If endowment be of tythes, and usage has not followed the endowment, the claimant, as to such tythes as fail of usage, shall not support his claim; any more than on a conveyance of lands he shall claim lands as parcel of the estate conveyed, where possession has not followed the conveyance.

Modus, when not binding. Vide 13 Eliz. c. 10. 2 Blac. c. 3. Temporary composition. Endowment of tythes, with failure of usage.

If

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Costs, when
defendant
claims more
tythes than
there are
tythable
goods.
Effect of
mispleader
of a modus.

If more tythes are claimed than the defendant to the bill has kinds of tythable goods, the practice of the Exchequer is, (it was represented to the court) to discharge the bill with costs, as to such tythes.

It appears, that mispleader of a modus in the Exchequer always occasions a decree for tythes in kind; even though it appears in evidence that it was a good modus; but it is without prejudice to the inhabitants of the parish.

Raymond *against* Webb.

Trustee
may not
vary the
mode of
sale pre-
scribed.

A Trustee under a will, sells by private contract an estate in trust, which by a decree of Lord *Camden* was to be sold before a master; the plaintiff, who was bargainee of the estate, was not party nor privy to the decree, but was a purchaser without notice, for a valuable consideration.

[67] Lord Chancellor—After a decree by Lord *Camden* in this case, that the estate should be sold before a master, the court cannot now warrant a sale by private contract.

Mr. Attorney-General contended, that the objection to the decree of Lord *Camden* interposing, was, that the plaintiff was no party to that decree.

Lord Chancellor—All the effect of that will be, the plaintiff may recover at law, which otherwise he could not.

Bill dismissed: The party being left to take his remedy at common law, the court being of opinion that equity ought not to interpose.

Michaelmas

Michaelmas Term,

12 Geo. 3. 1772. K. B.

Campbell's Case.

On a Plene administravit.

ON a motion for a new trial—On an action brought [68] against executor, he pleaded *plene administravit*; there was evidence that he had paid interest upon a legacy of the testator's. The jury found for the plaintiff. It was contended, that upon the evidence, they ought to have found for the defendant; for that there was evidence of his having fully discharged, as far as there were assets. On the other hand, that by paying interest on the debt, he had admitted assets. It was urged, that this payment of interest was injurious to the legatee, by lulling him into a false security, while the executor spent the assets in paying debts of an equal degree.

It was urged, that in the case of the Duke of Somerset, interest paid for seventeen years, was determined by the master of the Rolls, and confirmed by the Lords Commissioners, to be evidence conclusive of assets.

Lord Mansfield observed, that payment was *prima facie* evidence; and repeated payment, with length of time, very strong presumption: But that, though it imposed on the executor the *onus probandi* to the contrary, yet it could not in any case be taken conclusively against all evidence possible to be given.

That the payment in the principal case was pleaded, to have been four years continually. The difficulty the laws have laid on executors, for ages, has been properly complained of, that honest executors know not how to be safe, nor dishonest can be punished.

Where

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[69]

Where there is a bond-debt unknown to the executor, and there has been a payment of interest on a simple-contract debt, before the bond-debt comes out; in which case, it would be *mala fide* to pay the principal on the simple-contract, unless the bond-debt could be satisfied first; should the payment of interest on the simple-contract, under such circumstances, be conclusive against the executor? Certainly not.

His Lordship desired, that he might not be understood as giving an opinion, that the executor would be allowed debts in an inferior or equal degree after payment of interest, in the debt in question; for that then an executor might take an occasion, by paying a small sum on account of interest, to deceive and frustrate the just expectations of a creditor in higher degree, in favour of a creditor in inferior degree. That in all events, there was cause to grant a rule for a new trial.

The rule was granted accordingly.

Clark *against* Adair.

IN this case it was determined, that an engagement of intestate to pay money out of a growing fund, was a lien upon the administrator chargeable upon that fund.

Raymond *against* Bridges.

ON a writ of error brought against a judgment in the court of common pleas.—

The judgment was on an action on the case against the sheriff, in which there were two counts:

1st. That the defendant suffered *John Champion*, indebted to the plaintiff on account in the sum of 20l. 17s. 10d. to escape.

2d. That the defendant being sheriff of the county of *Essex*, might have arrested *Champion*, and did not.

The judgment, with damages and costs, amounted to about 60l.

For the plaintiff in error, error assigned against the judgment, that the two counts are totally repugnant; supposing the cause of action in both the same.

That they are the same is evident, The sum is precisely the same; both notes are dated the same day; both payable in ten days after date; the writ sued out in both on the same day. It will be said, every thing will be intended

in favour of the verdict; every thing that can be reasonably intended: But here, I conceive, the mere natural intendment will be, that the party was trying, whether he might not recover though one note only was given, by counting on two; or recover one way if he could prove an escape, and in the other if he could prove there might have been an arrest and was not: Your Lordship must intend too, that in the same day the plaintiff sued out two writs on notes of hand, when he might have recovered by one; you must intend too, that he did not know how much 20l. 17s. 10d. amounted to twice told, for he lays his damages at 40l. very reasonably if one note only, but preposterously and unaccountably if on both. For your Lordship knows, if any sum, how great soever, be proved, the plaintiff can recover no more than he has laid his damages in the declaration. I must, with great deference to your Lordship, observe, the court of Common Pleas differs from this court, in this; that if there be ever so many counts, and any one of them is proved for the plaintiff, he shall recover damages in his whole action, though the other counts go for the defendant.

[70]

I am told by the attorney, these two counts will make a difference in expence of 20l. to the defendant in that action, the now plaintiff in error.

In this court, I am told, if the plaintiff lays several counts in his action and proves only some, he can have costs only on the counts he proves; and that your Lordship went farther, and said, the defendant should have costs where no proof was for the plaintiff.

Lord *Mansfield*—I did so; but it was in the case of very special pleas. Therefore, where the plaintiff does not prove his counts, neither he nor the defendant has any costs in them, in common cases.

It was observed, that when the statute of *Gloucester* first gave costs, such was the simplicity of the common law, the counts were single, declarations single, and ever thing much shorter than at this time.

Lord *Mansfield* observed, That supposing there were but one note, justice had been done; the plaintiff had recovered no more than he was intitled: That nothing but a necessity of finding the note single could be regarded, so as to disaffirm the judgment. That every count was considered a distinct action; that those multiplied counts had taken rise from an inconvenience not many years ago in a case of
this

this nature. *That fineses of this nature were very proper in furtherance, very bad in hindrance of justice.*

Whether a Power of Revocation assignable
under a Commission of Bankrupts.

[71] **O**N a question, whether a power of revocation was an interest capable of paying to the assignees under a bankruptcy; the power being not in possession, but expectant on a contingency.

The power of revocation in the bankrupt was to take place on survivorship, and the bankruptcy arose before the event happened.

It was said, this was within the 13 *Eliz.* 34 *H. 8.* 21 *J.* 1. 5 *G.* 2.

That these acts, though separate, have ever been considered joint laws, and interpreted liberally and beneficially. Here was an estate for life; first to his wife, then to himself, remainder to his issue, and for default of such issue, remainder absolutely to himself. His wife, by whom the issue was to be had, was dead; he had no issue, could have none to take under the deed, therefore the remainder vested in him; and being so vested, was assignable: If not assignable, it's extinguishable.

Mr. *Buller* argued, there could be no fraud to the creditors, as there was no benefit they could take.

Lord *Mansfield*—The estate for life, remainder to himself in fee, is vested in the assignees; he could convey it by a common deed: The conscience therefore is, that he has no power to execute now, for the other limitations could not take place; the whole was in him, and is now in the assignees.

Goodwin against Philips.

THIS was a case, in which a jury, being at difference in themselves what verdict to find, on account of contrary circumstances, to balance, as it seemed, the evidence on both sides, agreed the majority of voices should decide. A party to the cause (the plaintiff) goes, and by private conversation finds this out.

Seven were on the side of the verdict, four against, and one doubtful. They debated it; and at last the majority brought over the others to agree, that their opinion should determine.

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The court, on all these circumstances, would not suffer a motion against the verdict; especially, as it was given on that side where they thought the evidence seemed to preponderate.

Bail.

PARISH of their residence, is not a sufficient designation in notice of bail. [72]

Bail not knowing how many he is Bail for, rejected.

BAIL asked, how many he was bail for since he obtained his certificate? *Answer*—Three. *Question*—Any more? *Answer*—Not that he knew.

Lord Mansfield—Don't you know how many you are bail for?

I don't keep an account.

Lord Mansfield—Then no man that does not shall be bail in this court.

Notice of Bail.

THE consequence of irregular notice is not discharge of the bail as bad, but grant of a future day to enquire. The effect of irregular notice.

Demand of Plea.

Toll.

ON a question, upon a toll for corn, it was disputed, whether malt was to be considered as corn? Plea demanded on a Sunday, is to be considered as no demand at all.
Lord Mansfield thought it was in the nature of flour; and being manufactured, and taking the denomination of malt, it was not to be held corn, but changed its species: And for flour, which was in the same predicament, no toll had been pretended.

But upon a motion for a new trial, upon the ground of the acts of parliament having constantly considered malt as corn, and so in the university-grants; his Lordship ordered a new trial immediately upon the motion without costs.

The

The King *against* Eden.

Information.

ON a rule to shew cause why an information should not be granted against the defendant, Mayor of *Derby*, for dispersing a paper charged to be a libel, reflecting on an attorney of the mayor's court.

[73] Objection against the rule—That there is no evidence to prove the publication complained of, nor that Mr. *Eden* was the publisher, nor that the party complained of was entirely innocent of the charge.

The paper complained of, was a petition against the attorney for keeping the petitioner in custody after having taken money for his discharge; and it was objected, that the affidavits of publishing and dispersing by Mr. *Eden*, went to memory, belief and opinion.

That this was an application in the way of extraordinary justice, and that the party applying ought to come clear before the court; and that the attorney was guilty of the breach of duty charged.

Mr. *Wallace*, on the other side—The carrying to the printer is proved against Mr. *Eden*; and this is publishing. The mayor had misbehaved himself most flagrantly, in joining in the petition, that the attorney might be discharged for his dishonest behaviour. The petition was addressed to the Recorder of the preceding year, (which certainly is not the style of the court,) and to all honest and humane persons; which makes it still more general.

The court seemed to think, that the carrying to the printer was not publishing, on the circumstances in this case; and that this way of proceeding by information was very improper.

Rule discharged.

The King *against* Coate, the Keeper of a Mad-house.

ON a motion for judgment of the court, for confining a person in a madhouse—

Lord *Mansfield*—This was an indictment against R. *Coate* the elder; and *Susanna* his wife, *Coate* the younger, *Ewbank*, and others, for sending Mrs. *Ewbank*, unjustly, and without

out legal warrant, to a private house for the reception of persons disordered in their minds, and there confining her for two months nearly. Mrs. *Ewbank* swears, she was very ill used by her husband, who took her children from her; afterwards he beat her, and used her very ill. 'Then he told her she must go to the child, who was ready to die, at *Stratford*; that he took her; she described the way and manner. The husband said, "This is for sending to me." "I never saw," she says, "a doctor or apothecary in the time. A lunatic bit my arm. I was chained. A surgeon was sent for, as pretence. A gentleman and a lady came, and pitied me. I feared the child would be hurt, or he would take the child and murder it on a common. Mrs. *Mills* came and lamented, I pitied her; she was sent by order of her husband, who, she said, had done the thing with Mrs. *Miller*." Mrs. *Eccles*, another witness, the same who she said came with a gentleman, said she was an honest, very sensible woman; that her husband used her very cruelly, and that she said he used the child—!—That she went to consult an attorney, how she might have a separate maintenance from her husband; that she was perfectly sane when she saw her; that she pitied her extremely, and wanted an *habeas corpus* to release her; but was told it would be very expensive. "What, if my husband had another wife!" She said, the husband had said, he would send his wife to a madhouse.

Mrs. *Mills* says, she was confined in a madhouse, with one person sane, and another lunatic; that she lamented, and Mrs. *Ewbank* with her lamented extremely; that they concerted matters together, to get her out; that Mrs. *Mills* wrote a direction, and hid it in her bosom.

On the part of the defendants. Of her being mad, and accusing her husband with every woman. That she would spit in people's faces, and the boys followed her in the streets. That she was either mad, or worse. That the husband was a very honest man. That *Miller* did not believe what she had said of his wife; that she was mad, or worse. From a general note, the husband's character is spoke to as good by all the witnesses for the defendant.

The jury brought *Coate* and his wife guilty, and *Ewbank* the husband; and acquitted the rest, without any great struggle on the part of the prosecutor.

On the part of Mrs. *Mills*. That she was brought to the same madhouse, under pretence of her husband being arrested; when she got there, she was cruelly thrown down; when she asked the place what it was, Mrs. *Coate* said

said, it was a place for mad bitches, such as you. She called Mrs. *Mills* a d——d infernal b——h. The stench, such as made her almost retch. They gave her rotten beef; and Mrs. *Coate* said, she was not mad, but a great b——h.

I would state, then, my directions to the jury on this occasion, as a matter of great public concern.—There is no authority by the law for a private madhouse. The circumstances must govern therefore. It would be very hard to say, that in cases where a party is unfortunately visited with this calamity, they should always have their case made notorious by a commission under the great seal. That every indigent person should be necessitated to that expensive remedy, which would swallow up all their substance. In Doctor *Monro's* case, you observe, whatever would be done [75] by the most tender husband or parent, must be the treatment; no coercion, no harshness of treatment; nothing but with the best view, subject to the assistance of the faculty. Whatever is done with any other view, all unnecessary severity, all confinement other than for the best purpose of the unhappy person's recovery; will subject to a censure proportionable to the conduct. Here I must take notice, that till this time I never heard of a madhouse, without regular attendance by some of the faculty; here, Mrs. *Mills* was under temporary confinement without any.

The other, be she mad or not, had no physic, she declares, since she was 17; no pretence she had any given her. Much has been said, and I think on a wrong foundation, of regulating these houses. The law recognizes them not; if we go to regulate them, we establish them by law. In Mr. *Wood's* case, Dr. *Monro* was acquitted by a special jury, both here and in *London*; it appearing there, that every thing had been done for the best.

Every case of this sort, must stand the strictest test: It must always be supported on its own particular circumstances. Whatever has been done not compleatly justifiable, must abide its fate. Whatever cannot be proved to have been with the best motives, let the doers answer for in such manner as those ought to do who have taken upon them an act of authority not allowed by the law, and in which necessity alone can serve for excuse, and that necessity manifestly proved.

Lord *Mansfield* observed—Of the two husbands, I think *Mills* much the worst; my difficulty is, how to punish the husband without ruining the wife.

A scheme of a separate maintenance was adopted; eight shillings a week proposed, the sum the husband of *Ewbank* allowed in the madhouse. He pleaded, his having been burnt out since, and the expence of supporting his child; he offered to pay five shillings a week, alledging, he would do his duty to his wife, which he had never refused; that he would be very glad if she became fit; that to promise more than he could perform would be fraudulent. Lord *Mansfield* observed—Mrs. *Eccles* evidence, of the husband's saying he would send his wife to a madhouse, and what was said by the wife, "this is for your sending a sheriff and warrant." If we punish him with long imprisonment, (his livelihood is by his labour,) we ruin him, his wife and children.

She was desired, I think, by Mrs. *Eccles*, who has received the approbation of the court for a sensible humane woman.

Ewbank was told, the court would be obliged to do what [76] was much against their inclination, if he would not undertake.

Mrs. *Read*, on the part of the husband, consented to maintain the child, on condition the husband should undertake to pay six shillings a week; with liberty to apply to the court, if he should ever be charged with his wife's debts, contracted during her separation.

The husband was desired by Lord *Mansfield*, to let his wife see her child sometimes; but, he said, the poverty of his circumstances would oblige him to send his child a hundred or two miles off.

The court stays judgment on *Mills*, till his wife thinks fit to complain of him; his condition being such, that he could not be imprisoned without ruin to both. The other three committed till the court should have considered the judgment on them.

Prescription*.

Rex against Johns.

ON an information in the nature of a *quo warranto*, to shew cause why he exercised the office of mayor of a corporation constituted by the charter of Queen *Elizabeth*
I —Pre-

* *Prescriptio est titulus, ex usu & tempore substantiam capiens ab auctoritate legis.* 1 Inst. 113.

—Prescription was pleaded, That from the justices of the last year for the borough, mayor for the year following is chosen. Objection to the plea, That there can be no prescription, where evidence is upon record of the creation of an office *vel cujusvis prater ea rei*; and that the office of borough-justice itself was created within time of legal memory; and, it was contended, took place in the time of *Charles 1st.* 100 years after the charter: That it cannot be prescription, nor even usage; for the charter gave no such power; and an usage against the charter cannot be supported, for that every charter implied a negative on every practice contrary to that it grants or permits. In *The King v. Philips, Strange's Reports*, where a mayor is elected *pro uno anno integro*, without *tantum*, or any other restriction added; in that case, *Philips* set up an usage from the charter downwards, for holding over in the office; but such usage was there declared bad. In the case of the corporation of *Yarmouth*, a constant usage was pleaded, and proved, of choosing by the majority of aldermen present; though the charter directs, they shall be chosen by a majority of the whole number.

[77] The usage was contended, as explanatory of the custom; that this court determined it could not be so. That Lord Chief Justice *Lee*, in the case of the corporation of *Yarmouth*, declared that usage could not explain a charter [against the words;] that the court must explain it [according to the words and meaning;] that the corporation in that case pleaded an usage, to choose their mayor from the aldermen: The words of the charter were, to be chosen from the burgesses or inhabitants; the construction they put on these words, and which they contended was established by usage, was, that aldermen being burgesses were not excluded from being justices.

In this case the court was of opinion, that the charter did not mean to include aldermen, and therefore the usage was not admitted*.

Lord *Mansfield* observed—Usage will be good or bad, according to circumstances; where the words of a charter are equivocal, and it stands indifferent how to interpret, contemporary usage will explain the words†.

* *Consuetudo non prejudicat veritati.*

† *Contemporanea expositio est optima interpret legum consuetudo.*

King *against* Rebot.

IN the case of tolls of a light-house rated to the poor — The question was, whether it came within the statute 43 *El.* It was said, *Fulham Bridge* was rated at 1000*l.* *per annum*, equally between *Fulham* and *Putney*: that if a master should put a servant into a light-house, he would certainly gain a settlement. *Bunbury* 81. there was an opinion, that light-houses were not of a nature to be subject to church-rates. Three judges were of that opinion; but Baron *Price* dissented. In the case in question, the light-house was actually used as a dwelling-house by the defendant; that the annual profit is the measure of the value; that 'tis objected, tolls are paid from different parts of the kingdom, and are of very uncertain profit; yet still, 'tis in consequence of the house that they are collected, and the house has a local relation to the parish of which it is a part; and some estimate may be made. That in *The King v. Corporation of Wickham, Hales* was of opinion, a mere toll was liable. Cellars, warehouses, corn-mills, ever were and are liable. Much stronger this: That *Ranelagh-house* would let at about 100*l.* *per annum*; but on account of the money it brings, is rated vastly higher. That there might be a question, whether heriots and such property were rateable; which may not arise within the year. But here is an house, lands, and annual profits; and as to the degree in which they should be rated, an appeal to the quarter-sessions would decide that.

On the other side, that the justices of *Harwich* were all interested, it being a local jurisdiction; secondly, there was reason enough to set aside the order, because they had taken in the duties, and had said so, in effect, in their order; for they rate a little building of no value but as a light-house, and scarce ten yards of ground, as bringing in 1400*l.* *per annum*. Thirdly, The toll is collected of ships passing by, not coming in. That there are about twelve such light-houses in the kingdom, and the attempt is unprecedented: That this had been compared to the case of a shop, on the other side; but who ever heard the profits of a shop rated? Mr. *Mansfield* added, that this was to be considered as the profits of an office: And that in the case of *The King v. Shellfield*, it had been determined, the profits of an office were not liable. Now here the office belongs to the crown, as of duty, for the preservation of the kingdom; and the

[78]

crown necessarily delegates that trust to persons who are to support the house, keep up the lights, and execute the other necessary concerns, and to have the profits in recompence. Mills are rated as houses inhabited by the miller and his servants, and not in respect of the toll. Lead mines are not rateable. Stalls in a market not rateable to the poor. *Vide Roll's Abr.*

His Lordship was desirous it should stand over; but expressed his present opinion, they were not rateable: *Et postea*, in the same term, his Lordship delivered the opinion of the court.

Lord *Mansfield*!—We are all of opinion, that the tolls being raised all over the kingdom from vessels from different parts, are not to be considered as locally related to the parish: And they have expressly rated the toll, and not the house. Has any body enquired of *Putney Bridge*, for I am informed that the attempt failed? However, it matters not as to this case.

Coate, the Keeper of the Madhouse, and his Wife brought up to Judgment.

PROPOSED by the court, That they should pay 50l. of which the one moiety to be placed in the hands of Mrs. *Eccles*, for the benefit of Mrs. *Ewbank*; and the other to be in the hands of a trustee. Mrs. *Mills* proposed Alderman *Harley*. Lord *Mansfield* said, he would speak to him upon, and would take care that her husband should not meddle. The rule was accordingly, *Coate* should pay costs of the prosecution, and 50l. into the hands of Alderman *Harley*, for the support of Mrs. *Mills*; 50l. to Mrs. *Eccles*, for the support of Mrs. *Ewbank*.

The Court set a fine of 6s. 8d.

[79] Lord *Mansfield* observed, That it was proper persons who kept these houses should be taught, by this example, what had been earnestly repeated to them before; “that the circumstances of the case alone could support their act.” That they were not to take a wife, because her husband said she was mad; nor an husband, because his wife. That the opinion of an able physician, on view of the party, and on his examination into the case, would be the only proper guide: And that every thing must appear strictly, with all diligence and due advice, to be done for the best.

Appren-

Apprentices.

ON a case of binding out apprentices by churchwardens, as under the statute of 39 *Eliz. c. 3. sect. 3.* It came before the court on an order of sessions.

The churchwardens bound out the child to a person of another parish.

Minchard, cited from *Salkeld*; *stat. 8 & 9 King William*, cited; statute of *Queen Ann*, cited.

Argued, That the statute of *Elizabeth* saith, that the churchwardens may put out children to whom they see convenient; and are the words "within the parish" to be supplied?

On the other side it was observed, in the case of *Salkeld*, cited above, the judgment was on account of the particular time the child was bound out.

Lord *Mansfield*—This ought to have been made a special case; and the person not receiving should be indicted, that it may come before the court in that way; it not appearing on the order, whether the justices made it on the matter of law, or insufficiency of the person to whom they bound the child. His Lordship observed, there had been a case two or three terms ago, where a person, to whom the child was bound, had a house within the parish, [but not resident there.]

It was suggested by counsel, The sessions had determined, though not specified in their order, on the point of law. That apprentices could not be bound out to an housekeeper of another parish; though such housekeeper was an occupier of lands within the parish belonging to the churchwardens so binding out.

This came before the court so, that Lord *Mansfield* had not an opportunity of delivering an opinion judicially; but he observed, as a private opinion, that he thought if the justices did determine on that ground, they did very right. [80]

Mr. Justice *Aston* was of the same opinion: And observed, how hard it might be to bind an apprentice on a person occupying lands in one parish and being a housekeeper in a very distant one.

Bankrupt.

LORD *Mansfield* expressed a doubt, whether a bankrupt could demand inspection of the proceedings under

der a commission, in order to litigate them. On consulting concerning the practice, it appeared, that such inspection was never permitted in a case where the bankrupt litigated an act of bankruptcy.—It was compared with inspection of a record. But Lord *Mansfield* said, if the truth was with them, they did not want inspection: but that the use of it would be, that they might make evidence, by seeing where the evidence pressed. Lord *Mansfield* said, the court would order, for asking, that the clerk of the commission should attend with the proceedings at the trial.

It seemed agreed by the court, that a creditor might demand inspection of the proceedings.

Horam against Humfreys.

Action on a Promise of Marriage.

THE cause was tried by Mr. Justice *Aston*. The damages were laid at 5000*l.* and the promise was proved, and procuring of a licence by the defendant. The judge represented to the jury the nature of the action; the injury of fixing a young woman's affections, and then trifling and flying off, after a solemn deliberate engagement, so far advanced; and the prejudice it might be to her in future life: That they should give such damages as the circumstances in evidence, either aggravating or extenuating, should require; and that the rank and condition of the parties would be to be considered. And that he could not help observing, that the fortune of the defendant had not been given in evidence, though the damages were set, in a vague manner certainly, at 5000*l.* that they would regulate their damages, therefore, from what from his business he might appear; and any ability they might have to judge of his substance. The jury gave 500*l.* damages. Mr. *Horam*, the father of the plaintiff, had a place in the board of works, and the defendant appeared to be a pawnbroker.

Nuncupative Wills.

[81] **P**ROOF of them in the Prerogative-Court at Doctors Commons.

Execution.

Execution.

SHERIFF liable to the acts of his officer acting under colour of his warrant.

Executor.

THE will itself, before probate, is sufficient title for the executor to the goods of the deceased, as to his property as executor; the probate being only necessary to enable him to sue for debts due to the testator.

Simson against Tuck.

ON an action to recover penalties, on the statute 13 G. 2. for running a gelding not his own property, of the value of 20l.

Another penalty for running a gelding for less than 50l. Penalty 200l. on both taken together.

The counsel for the prosecution—That the act was intended to discourage petty matches amongst the lower people, and to improve the breed of horses. They called witnesses to support their case.

It was argued for the defendant, that upon the preamble of the act it appeared, that “whereas idleness among the common people is encouraged by the races for small sums, be it enacted,” &c. and that the worst of all idlers are common informers; but that since the law supported information of this kind, they were only desired not to assist the charge unless they found it plainly evidenced.

Witnesses were called on the other side.

Lord *Mansfield* left it to the jury; observing, that the value of geldings was not at all proved, which was a leading point. That the question turned upon what horses were entered for the saddle, and that if they believed they entered for the saddle, and then run to have the saddle for forty shillings, it would be the same as if they ran for the saddle. [82] That one of the witnesses said they did not run for the saddle; that the jury would judge of the weight of probability, for if true, then the evidence did not support the count.

That on the part of the defendant it was said, that the father did not run the horse; that it was quite without his privity; that this was peremptorily sworn, and a full defence

fence if true. His lordship observed some circumstances in corroboration; which if they believed, they would find for the defendant; if not, the offence was grievously aggravated: It was perjury to avoid a penalty fixed by the law, on which the question upon the facts arose. That he doubted not they would find a proper verdict.

Jury found for the defendant.

Misnomer.

PLEA against an action for misnomer of the defendant's christian name, *Clarissa*, when it was *Clara Elizabeth*; but having put in bail in the name of *Clarissa*, she was precluded from that plea.

Blackwell *against* Green.

ON information against the defendant, master of an hackney-coach, for endeavouring to drive over him, and striking him.

After judgment by default, they would have read affidavits in denial of the fact.

Court—They can't controvert the fact after suffering judgment to go by default; they must pay costs.

Partnership.

EVERY partner is liable jointly and severally.

Settling of Cases.

LORD *Mansfield* said, he used to observe cases were usually reserved and hung over often four or five years. That it was the custom formerly for judges to have cases argued at their own chambers. That he never suffered a case to be reserved for him to settle; and always took care to have one case settled, before the next came on: And now, he added, I believe it's the constant practice, and I will not permit that practice to be broken in upon.

[83]

On an application, that an alteration might be made in the settling a case, which had been already drawn up and signed by the counsel——

Lord *Mansfield*—In this case the jury having found their verdict, and the case drawn and settled, we cannot now alter

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alter it nor can I permit it. *As it was settled in the presence of the jury it must stand.*

Stow *against* Drinkwater.

Chattels in auter Droit.

IF a feme-sole be possessor of chattels in *auter droit* as executrix, and after intermarry, the law maketh no gift thereof to her husband though he survive her.

A case was mentioned by the court, in which the husband had possession as being *prochein ami*. *Vide 3 Mod.* 58—9.

Putting off Cases by Consent.

LORD *Mansfield*—The order of the court, which confines to four days, would be entirely evaded, if putting off by consent, without good cause specified, were allowed. I remember a case when I came into court, the famous case of *Robinson*, which had been put off by consent twenty-three terms.

Return of a Sheriff to a Special Capias.

RETURN *non est inventus infra balliv'*; but the names of the sheriffs in the return were *Oliver* and *Bull*, one sheriff of the last year, the other of the present.

Motion for an attachment for a false return.

Rule granted: But the court desired they would give notice to the parties before they took them, that they might appear in court, and, if it was a mistake, shew it.

Davenport *against* Tyrell.

A Writ of error on a judgment in the King's Bench in Ireland, 9 G. 3. The judgment was given upon a bill of exceptions tendered below. Lord *Mansfield* declared the opinion of the court, that the court below was wrong, in giving judgment on a bill of exceptions; but that they had given judgment, independent of the bill of exceptions, as they ought to have. And added, We cannot reverse it for the informality. [84]

It was on a question of the right of holding office as mayor, in which there were two issues; one of which was, whether

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whether duly elected; the other, whether he had taken the sacrament in due time. And on the second issue, they did not find that he had taken the sacrament, but only the oath; whereon judgment was given against him, and that judgment affirmed.

Notice of Indictment.

Question on the 14 G. 2. c. 17.

NOTICE on the 20th *July*; commission-day on the 29th; before 14 G. 2. fourteen days notice was always to be given; on which account it was contended, that the ten days must be conclusive of the day of notice. But the court did not affirm nor controvert that point, it not coming directly under consideration.

Execution levied by an Attorney after Notice of the Debt satisfied.

JUDGMENT, That the attorney restore the goods in execution; pay the costs of execution, and the costs of the action.

Conviction.

THE conviction of return of a pauper from the place to which he has been legally removed, must be by confession, or oath, or view of the justice himself; and the return must be without certificate, to make the conviction good.

Vagabond.

[85] **J**USTICE, by 13 & 14 *Car. 2.* may commit a vagabond to the watch-house, to hard labour for a month, or to the next sessions.

Commitment.

NO supporting one on the statute G. 2. for returning, without the return certified in the commitment.

Affidavit

Affidavit of Debt.

A. Maketh, that *B.* is indebted in a certain sum, then the jurat signed. Affidavit sufficient, it being under peril of perjury if not true, though the word oath omitted. *Quod nota.*

Bennet's Case.

DEED of covenant in consideration of marriage. Estate for life, to the husband and wife. Covenant to renew leases as long as the husband and wife should live, for the benefit of the issue male; and on default of such issue, for the issue female of their two bodies: And in case either of *cestui que vie's* did become sick or infirm, the husband and wife being two of them, the husband should renew such lease or leases.

The question was, Whether after the death of the husband it was not the intent of the deed, the executor should renew; and if the executor should renew, then whether, as he had once renewed, the intention were not thereby satisfied; his executors, heirs or assigns not being mentioned? *Siderf.* 151. was cited.

It was contended, That if the executor, and his executors or assigns, were not to renew, the provision would be nugatory; the leases must be full at the time the issue is to take.

It was further argued, That the executor was to renew out of the personal estate, and not out of the surplus of the real.

On the other hand it was argued, That the intention certainly would be executed here, if made out, as well as in a court of equity; but that the intention was otherwise.

Further, That it was said expressly in the deed, the remainder of the term was what the heir was to have. In *Siderfin*, the case was, *A.* covenants to give *B.* 20l. a year; this was contended to be only a gift of a single 20l. for one year: But there, the evident construction could not be such as was contended; but here, a lease has been renewed, which is all the words or reasonable intendment require.

To this it was objected, in replication, That not the words only, but the intention of the parties, and the interest they had, the objects they had in view at the time, were principally to be regarded. That every deed is to be construed in favour of the purchasers; that even the words "such lease or leases" were directly convincing.

Lord

Lord *Mansfield*—This is a case of a marriage-settlement. The husband, being possessed of a church-lease, covenants to surrender in six months from the marriage, and purchase a new lease, in which the wife was to be one of the *cestui que vie's*; because she was to be sure the lease should not determine during her life. It's said, that the word "either," which properly is between two, signifies only, that when one of the first lessees dies, another is to be put in. This will not answer the following words, "lease or leases." Besides, expressly, *Ethelred*, the wife's name, is always, by the covenant, to be continued during her life: This supposes a possibility of more than one removal. If but one, the heir might have nothing but only the surplus of the profits.

I construe, That the heir in the deed of *Thomas Bennet* the father, was to have a full lease.

'Tis not usual to give an opinion, in a case coming out of Chancery; but in this I do, and shall direct the certificate accordingly.

Richardson *against* Fen.

On a Plea of Non assumpsit infra sex Annos.

Plea of non assumpsit infra sex annos. Any the slightest acknowledgment would take it out of the statute.

THE defendant pleaded the statute of limitations, *non assumpsit infra sex annos*. Evidence, it seems, came out on the trial, that he met a man in a fair, and said he went to the fair to avoid the plaintiff, to whom he was indebted. This was within the six years, and was held a sufficient *assumpsit* to take it out of the statute, there being no other debt between them; and thereupon the jury found for the plaintiff.

On a motion for a new trial—

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Lord *Mansfield*—A very little would take it out of the statute of *non assumpsit*. In a case of Lord *Barrymore*, *A.* said to *B.* You are indebted to me so and so; *B.* said, No; but we will settle the account. This acknowledgment of an account to settle between them, was held to take it out of the statute.

Wheatly *against* Edwards.

ACTION of criminal conversation; the jury had found for the plaintiff. On a motion for a new trial, there was strong evidence of perjury in the witnesses to the

the criminal conversation, on express testimony against them.

The plaintiff had sworn before an attempt of the defendant to commit a rape on his wife; and afterwards an actual commission by *Edwards* the defendant; the jury brought in their bill ignoramus.

After this, the defendant brought an action against the plaintiff in this cause, for a malicious conspiracy, and recovered 300*l.* damages.

After this the husband brought his action against the defendant, for criminal conversation, and succeeded.

There were strong circumstances in proof of the charge; amongst others, the plaintiff's own mother swearing it, and the express and positive testimony of the witnesses to the fact. On the other hand it was remarkable, that the mother should have mentioned nothing of this to her son, till a long time after; but for this she accounted, by saying, as Lord *Mansfield* observed, that her son knew enough already; and had sufficiently suffered by his wife's elopement. There was great improbability, too, that men, who appear to have been utter strangers and not apprized or suspecting, should come precisely in time, and be ocular witnesses of the fact; and this, I think, in noon-day, in the husband's house, and the door not fastened. And that the husband himself should swear first to an attempt of force; then to actual force; and then to voluntary familiarity of his wife with the same man. This and other circumstances Lord *Mansfield* particularly observed. There was direct testimony of subornation of perjury, by the plaintiff's consent, of the witnesses; and this in different places, by three different witnesses. On the other side, four persons swore to the character of one of the witnesses, who was living, and who swore the other was dead, and that he had seen him in his coffin; and yet there was a witness who swore an affidavit that this man was alive.

Lord *Mansfield* pronounced, That there appeared no ground on the evidence for granting a new trial; but that they might proceed by indicting the witnesses for perjury. *Note*—In the case of *Chapman*, there is farther notice taken what was the event of that indictment, and the consequences thereon. *Vide Infra*. [88]

Bail.

BY a late rule of the court, bail not present at the first sitting of the court must wait till the rising.

Golightly

Golightly *against* Reynolds.

Of trover.
Vide 3
Blackstone
152. 8vo.
edit. Cro.
Eliz. 434—
5. 219, 485,
495, 638,
723, 824,
870, 883.
Salk. 655,
666, 667.
4 Bur. 1.
p. 31.
4 Bur. 1363.

ACTION of trover upon the following case: Action brought for six silver table-spoons, two silver salts, two silver salt-spoons, one bank-note of 20l. No. 203, dated 19th November 1771, and ten guineas in gold; all which were the produce of a bank-note of 50l. stolen by one *Ferguson*, found on him when taken up, and produced in evidence at the *Old Baily* by the plaintiff, the prosecutor, at the trial of the said *Ferguson*, who was convicted of the theft of the said bank-note of 50l.

Before the action was brought, all the said table-spoons, salts, and salt-spoons, and the said bank-note of 20l. and the said ten guineas in gold, were demanded by the plaintiff from the defendant, who had them in his custody, and refused to deliver them.

The question is, whether the plaintiff can recover in this action?

Signed { EDWARD BEARCROFT, for defendant.
THOMAS DAVENPORT, for plaintiff.

(Copy of the original case laid before the judges.)

For the plaintiff it was argued, that till the 21 H. 8. c. 11. Restitution was not, except in appeal; but that act gives restitution on indictment as well as appeal. It gives indeed, a particular mode; that justices of gaol-delivery, or other justices before whom such felon should be found guilty, shall give such remedy by writ of restitution, as by appeal; not excluding, 'tis apprehended, any other mode.

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That *Hawk. Pl. Cro.* says, there is a mode of recovery when the goods demanded were not stolen from the plaintiff; when the appellee hath disposed of the things stolen, the appellant hath a right to what the things stolen were disposed of for; and that now the law was the same in that case. And so was the case of gold stolen, and changed into silver, *Cro. El.* 661. and cattle stolen, and sold in open market, *Noy* 128.

That was this action of trover not to be good, another action cannot be well conceived. Detinue would not do properly, as being rather for the things themselves. Trover supposes an innocent finding; but yet a wrong in the refusal of restitution: which applies precisely to the case.

On the other side, That on consideration what the nature of an appeal is, the plaintiff has not here a writ of restitution. It is given on an appeal, as an encouragement to prosecute

prosecute to conviction; and it is to recover the specific thing. Where the proceedings are to recover specific goods, the form is exact. If an appeal be to recover a specific thing, one should expect the form should be accordingly; and in fact, an appeal, by the form, gives the recovery of the very things stolen: And even if any thing stolen be omitted, it cannot be recovered.

That if the court should think the argument too strong, at least the defendant was excusable, acting under great authorities, in bringing the case before the court.

That trover was insufficient, when the party was taken, and the goods seized, on behalf of the crown, by the proper officers. That then, the plaintiff could only recover by judgment of appeal: That this would be the case, if the action was brought for the very goods. That if the authorities of law, cited by Mr. *Bearcroft*, on the other side, were too strong to be contradicted, and an action would lie, without the necessity of bringing an appeal, yet this was not the proper action; and that the propriety of law gave detinue, not trover: For that, to maintain trover, you must state, and be able to prove, that the party was possessed of these goods, and accidentally lost these goods; and that the defendant found them, and refused to restore. If you never had the possession of the goods, you fail in the ground of trover.

That this benefit is to be had as in judgment on appeal by the award of judges of oyer and terminer. But in this case, there being a doubt in the learned judges, whether such benefit can be administered here, the proper court is mistaken; the remedy is not here. That Mr. *Reynolds* acted under a special trust, under obligation of office, and would be unjustifiable by delivery of them, without proper authority; that the writ of restitution is founded on improper detention; that as to this action, at least, of tro- [90]
ver, it ought not to be maintained.

The judge who tried the felon said, that, on the conviction, Mr. *Reynolds* declared he should make no difficulty of the matter; and seemed then willing not to contest the restitution. The writ of restitution was contended as a necessary and decisive remedy. To which it was answered, they might plead to the writ of restitution, so that it was not immediately decisive.

Lord *Mansfield*—It would be the hardest prerogative possible, if an innocent party should lose his goods to the crown, because a felon had taken them away. There is
very

very great reason why, before prosecution, to avoid composition of the felony, trover should not be brought. There is no question, therefore, but some way, and to some extent, a plaintiff is entitled to restitution. But how are we to construe the restitution which should be made? Narrowly, for the very thing stolen? No: Liberally, against so odious a prerogative.

Vide 3 Inst.
242. b.

Title Resti-
tution, pl.
22.

Brooke cites the 7 E. 2. where it was agreed by the judges of the King's Bench, and by those of the Common Pleas, that in appeal for money taken *felonice*, restitution shall be where no property is known.

I don't see why trover is not good.—The statute puts an indictment in the same case as a writ of appeal. The statute says, it shall be restored; but leaves the party to his own way of recovery.—Since this statute, it gives him a particular remedy, but does not take away his other remedy.

Vide Cro.
Eliz. 278.
of Restitu-
tion, and
638. Vide
etiam, 661.
which
speaks ex-
pressly to
the point of
this case.

I don't believe there has been a writ of restitution these two hundred years. The case has been adjudged already, in former cases; as in *Noy* and *Cro. Eliz.* very rightly before, in favour of natural justice, against the rigour of the forfeiture.

Vide Burn,
title Resti-
tution of
stolen goods
vol. 3, p.
194, 4to
edit.

Mr. Justice *Aston*—*Croke* says, and this has greatest weight, as a cotemporary exposition, that in his time such recovery of goods was common at *Newgate*. He means the *Old Bailey*.

Burn, a very judicious writer, takes it to be within the statute of H. 8.

Judgment for the plaintiff.

[91]

Note, The words of the statute H. 8. are, “ Be it enacted
“ by this present parliament, that if any felon or felons
“ hereafter do rob or take away any money, goods,
“ or chattels, from any of the king's subjects—from
“ their person, or otherwise, within this realm, and
“ thereof the said felon or felons be indicted, and after
“ arraigned of the same felony, and found guilty there-
“ of, or otherwise attainted, by reason of evidence
“ given by the party so robbed, or owner of the said
“ money, goods or chattels, or by any other by their
“ procurement, that then the party so robbed, or
“ owner, shall be restored to his said money, goods
“ and chattels; and that as well the justices of gaol-
“ delivery, as other justices before whom any such
“ felon

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" felon or felons shall be found guilty, or otherwise
 " attainted, by reason of evidence given by the
 " party so robbed, or owner, or by any other by
 " their procurement, have power, by this present act,
 " to award, from time to time, writs of restitution for
 " the said money, goods and chattels, in like manner
 " as though any such felon or felons were attainted at the
 " suit of the party in appeal."

Vide 5 Co. 110. *Viner's Abridgment*, p. 156. title Rest- Foxley's
 titution; and *Kelyng*, 49. case.

I do not find a writ of restitution, directed to the sheriff,
 though a friend has mentioned one; but I find a writ of
 restitution to the bailiff of a liberty; which, *mutatis mu-*
tandis, as to that circumstance, I conclude must be the
 same. I shall copy it *verbatim* from the *Thesaurus Brevium*.
 It is thus:

Writ of Restitution to the Bailiff of a Liberty, in an Appeal of Robbery. Thes. Brev.

Rex, &c. W. A. ballivo prioris domus, de C. &c. cum
 R. T. nuper in curia nostra coram nobis appellaverit T. A. de,
 &c. de eo, quod idem T. unam bursam, &c. (recitando omnia
 bona ut in appello) ad valentiam 40l. de bon. et catt. præd.
 R. & 16l. in pecun. numerat. de denar. prædicti R. apud W. in
 com. M. invent. felonice furat. fuisset, cepisset, et asportavisset,
 contra pacem nostram, unde præd. T. per quandam jur. patrie
 inde inter eos capt. convict. est. Et pro eo quod invent. est per
 eund. jerat. quod idem T. ad recent. prosecut. dicti R. capt. fuit,
 fuit nobis constat de record. Cons. fuit in eadem curia nostra
 coram nobis, quod præd. R. rehabeat bona, catt. et denarios
 suos præd. ac jam ex parte præd. R. in curia nostra coram
 nobis accepimus, quod bona, catt. et denar. præd. ad manus tuas,
 6 die, &c. ult. præterit. tent. apud G. præd. devenerunt*.
 Ideo tibi præcipimus quod eidem R. plenam restitution. eorundem
 bon. catt. et denar. sine dilat. habere facias. Fit qualit. hoc
 breve nostrum fueris execut. nobis, apud Westm. die, &c. const.
 fit. hoc breve nostrum nobis remitten. T. &c. *

* So the co-
 py; but I
 presume it
 will be
 found thus:
 In curia
 nostra, co-
 catt. et de-

am nobis, 6 die, &c. ult. præterit. tent. apud G. accepimus quod bona,
 præd. ad manus tuas devenerunt; and so I have translated.

K

The

* It is submitted to the learned, whether by this writ of restitution the
 bailiff, or sheriff when served on him, was not on the face of it empower-
 ed to restore in value, in case the goods were lost? The appellant, for cer-
 tainly, was obliged to specify all the goods on his appeal; and this writ
 perfects the declaration, and commands restitution of the same goods, in
 like

The King, &c. to *W. A.* bailiff of the prior of the house of *C. &c.* Whereas *R. F.* late in our court before us, hath
appealed

like manner specifying them : So that if the goods were to be had, I apprehend the sheriff could not give the value instead of them ; nor the appellant demand the value ; but the very goods were to be restored : And if he had omitted any in his appeal, he could not have restitution of them awarded by this writ ; for the writ could not contain other goods besides those in the appeal. If, however, the goods were lost or destroyed by any unavoidable accident, the value of them is specified in the writ.

Is not this a direction to the sheriff in that case, that he may know what he is to restore, in lieu of the goods lost or destroyed ; and the appellant may know what he has to receive ?

And might not the sheriff have returned, That since the issuing of the writ, and before it came to his hands, the goods were destroyed by fire, or stolen by house-breakers, or the like ; and therefore, that he had made full restitution thereof in value, according as the value of the same was expressed in the writ ?

Would it not have been strange, when the goods were in the custody of the law, that the appellant, after the expence of prosecution, should lose all benefit of the writ, only because they were destroyed, lost, or perished, without his fault ? Suppose they were in their own nature perishable, and not capable of keeping ; as dead fowls, or the like ?

Suppose the very case here, that they had been changed by the felon before conviction ; might not the writ, which expresses the value, have then been adapted to the case, and have directed the value to be given, when nothing else could be given ? Does not the reason given by Lord Coke fail, if the party had omitted in his appeal to recite the goods stolen, the felon might have escaped conviction ; and the writ of institution shall not give him more than he has recited in his appeal, because he should be punished for his neglect ? But if the identical subjects of the appeal are gone without his fault, then may not the writ of restitution give him the value ; or may it only recite what is not, and do nothing for him, when he has done all that the law requires ? Surely if it expresses the value, even when the goods remain, it does not this for nought ; and a multo fortiori it will give a suitable remedy, when the goods were gone before the appellant could be entitled to the writ.

In Flowden's admirable Commentaries, there is a dissertation on equity of interpretation of statutes—*Eynton against Statute* ; at the end of the case, among other cases, this is put. By the statute 1 E. If a man, dog or cat escape out of the ship, neither the ship or any thing in it shall be esteemed a wreck ; [and note the equity of interpretation extends this to any other creatures,] the sheriff is to save all the goods he can, and keep them for a year and a day : That if the owner claim them within that time, and make his title, they may be restored to him ; if not, they are the King's, a price being set upon them by the sheriff and corporation. And they are to be sent back to the ville or town where they are found, that it may be known what is the King's. And if the sheriff be convicted of doing otherwise, he is to be imprisoned during the King's pleasure and to pay damages. Now, suppose the goods were fresh meat or fish, apples, or oranges, or any thing which would not keep, and the sheriff sells them, and deposits the money in the ville or town ; by the letter he should be imprisoned, but by the spirit and equity he hath done well ; he shall not be punished, he hath fulfilled the law.

I do not mean these observations to confirm the judgment, which perhaps were actum agere ; and it stands on a better ground ; but as the writ is un-
common

appealed *T. A.* of, &c. and that the said *T.* one purse, &c. [94]
(here recite all the goods as in appeal) *to the value of* 40*l.* of
the goods and chattels of the said *R.* and 10*l.* in money,
of

men, and little known, I hope I may be excused for transcribing it, and
having the correspondence it seems to have with the judgment.

In Tremaine's Pleas of the Crown there is a writ of restitution, on the
very statute of 21 H. 8. which has been pointed to me.

The case is, *Burges v. Coney*: The writ runs in hæc verba—

Midd. ff. Dominus Rex mandavit Edwardo Coney breve suum, in hæc
verba: ff. Gulielmus tertius Dei gra. Anglie, Scotie, Francie et Hi-
bernie Rex, indei defensor, &c. Edwardo Coney salutem. Cum ad
illam delib'ationem gaole nostre de Newgate, tent' pro com. Midd. apud
Justice Hall in le Old Bailey, in suburbiis civit. London. die Mercur. scilicet,
9 die Decembris, anno regni nostri octavo coram Edwardo Clarke mil.
major. civit. London. Georgio Treby mil. capital. Justic. nostro de banco,
et al. sociis suis justiciariis nostris ad gaol. nostrum de prisonar. in eadem ex-
istent. delib'and. assignatis ad recentem prosecution. Johannis Burges sen.
quidam Thomas Barnes, nup. de paroch. de Enfield, in com. Mid. labour-
er, convict. existit de eo quod ipse 28 die Augusti, anno regni nostri octavo,
apud paroch. præd. in com. præd. tres juvenecas, Angl. three heifers, color.
red pied, p'tii cujuslibet earum 3*l.* 5*s.* et un. al. juvenecam, Angl. one hei-
fer, color. black, p'tii 3*l.* 5*s.* de bonis et catal. cujusdam Johannis Burges
sen. adtunc et ibidem existen. adtunc et ibidem felonice furat. fuit
cepit et effugavit, contra pacem nostram coron. et dignitat. nostras prout per
record. inde plenius liquet et apparet. cumque ex insinuatione præd. Johan-
nis Burges jam accepimus quod separam. juvenec. bon. et catal. præd. ad
manus tuas devener. et in custod. tua jam exist. Nos igitur volentes p'fat.
J. Burges fieri quod est justum et rationi consonan. tibi precipimus sumit.
injungend. quod. juvenecas bon. et catal. præd. vel. tal. cor. qual. ad manus
tuas unquam devener. seu jam existunt p'fat. J. Burges sine dilatione res-
tituas et delib'es juxta formam statut. in hujusmodi casu edit et provis. vel
quod tu ipse sis coram justic. nostris ad gaol. nostram de Newgate, de prison.
in eadem existen. de ib'and. assign. ad prox. delib'ation. gaole nostre præd.
ff. com. Midd. tenend. apud Justice Hall, præd. die Veneris, scilicet, 15
die Januar. nunc prox. futur. ostensur. quare id facere noluisse vel non po-
tuisse et ulter. ad faciend. quod curia nostra in ea parte ulterius considera-
verit; et habeas ibi tunc hoc breve.

Et præd. E. Clarke milit. major. civit. London. præd. apud Justice Hall
præd. 9 die Decembris, anno regni nostri octavo. Harcourt—Tremaine.
315.

I have been reminded, that the writ of restitution, saying *ad valentiam*,
does it not to enable the sheriff to restore the value; but only because the
appeal, or indictment, must recite the value,—that it may appear, whether
the offence is grand or petty larceny: I believe in highway robberies, and
burglaries, the indictment recites the value; though a penny there is as much
capital felony as an hundred pound. But, since the reciting the value in
the indictment is held to be of some use, towards ascertaining the degree
of the crime, or for other reasons, why may not the same value, recited
in a writ of restitution, be of use in favour of the prosecution: for whose
benefit the same remedy is given on indictment, which before could only be
had, and that with greater difficulty and circuitry, on appeal? And perhaps
the value is not recited in indictments simply to shew whether felony or not
felony; since in some instances it's felony independent of the value: but it
may be to enable the crown to give relief, in case the goods are changed
between indictment and this writ: or, if not originally intended, the ge-

of the money of the said *R.* at *W.* in the county of *M.* feloniously stole, took and carried away against our peace; whereupon the said *T.* by a certain jury of the county thereon between them taken, was convicted: And whereas it is found by the jury, that the said *T.* at the fresh suit of the said *R.* was taken as to us appeareth of record. It was considered in the same our court before us, that the said *R.* have again his goods and chattels aforesaid.

And now on the part of the said *R.* in our court holden before us on the 6th day of April last past, at G. &c. we have been informed, that the goods, chattels and money aforesaid, have come to your hands. Therefore we command you, that to the said *R.* you cause full restitution to be made of the said goods, chattels and money without delay. And how you shall have executed this our writ, you shall make appear before us by the return of this our writ. Witness ourself, &c.

Arminer's Case.

[95] **Q**UESTION, whether for life or in fee? Devise of my worldly estate to my daughter *A.* for life; and after her decease, to her daughters *A.* and *B.* equally, according to the custom of the manor: The rest and residue of his goods and chattels undisposed, viz. the grange, to his son. Contended, that this, by the rules of law, was no more than for life, no more having been expressed. It was said farther, the intent of the testator was, that it should be no more; for in the instance before, where he intended to give an inheritance, he limited after estate for life, to them for ever. By a grant for life, he will have disposed of what he calls his worldly estate; and this description

neral equity of the case, perhaps, may attach to it. Because the laws favour restitution. And by 6 Rep. 60, where Popham 191. is cited, this statute extends to executors, though not named: and it should seem greater reason that the sheriff should restore in value to the party himself, where the goods are lost. And if the sheriff ought to restore in value, on a writ of restitution; in that case, then the party may recover against the sheriff when he refuses to restore, which was the principal case.

Note also, The judgment in detinue is for the thing; or if that be not restored, then to enquire the value. Vide Rastell's Entries, 213. title Detinue, pl. Judgment, sec. 4.

In Rastell's Entries, title Appeal, pl. Restitution, 1, 2, 3, 4, 5, 6, 7, you may find writs of restitution in various cases, but without the words *ad valentiam* in general: in one of them there is, which is after verdict. However, when these words are omitted, the general reason seems the same; and when they are used, the value is ascertained without circuitry.

scription of it will be naturally and sufficiently fulfilled, by suffering the particular estate to descend accordingly; and, on its expiration, the reversion to vest absolutely in the heir at law.

The heir at law shall not be disinherited but by express terms: And though in this case, he might have displeasure against his eldest son, yet he might be contented to convey the estate to the infants in question for life; so as to pass it from his son, during his life, in all probability, but not to the disinheritance of his son's children.

Blatson and *Barnewell*, before Lord *Talbot*, and *Tuffnel* and *Page*, before Lord *Hardwicke*, were cited to prove, that passing worldly estate, did not always infer an intention to pass the whole interest.

Question made, what was to be understood by "according to the custom of the manor?"

It was answered, it might be understood by customary fine, &c.

It was argued on the other side, that another devise was to a son, in the same words, which yet clearly passed a fee.

That two precedent devises were the same, where a fee was admitted, only with these words, *for ever*, which did not properly pass a fee; but in a will, upon the ground of intention. The testator gave what was not specifically bequeathed to these two: there was no specific bequest besides.

Burr. 2. by Lord *Mansfield*. *Oakes*, on the demise of *Windfall*, against *Bridal*.

An enquiry was made, who those were, to whom testator passed remainder over; but not answered. [96]

It was insisted by Mr. *Buller*, that the bequest first made to the son, of the grange, excluded him from any thing else. And it being admitted, that the general import of the words *my worldly estate*, was a disposal of the whole, what was there to counteract the general sense here?

The case of *Oakes* and *Bridall* seemed determined on different grounds; and Lord *Mansfield* declared it so. For there, it being a devise among seven, of a house and stable, (a very small and perishing property) it was determined it should be sold, and the money divided.

Lord *Mansfield*—This is the construction of the will of a mariner, [this appeared in the beginning of the will, I think] who seems not to have had much abler assistance. We must endeavour to make out his meaning as well as we are able. Nothing is clearer than that, generally, a fee shall

shall not pass without express words of limitation. But in a will, it has been much held, that "*my estate*" was implicative of a fee, when it might be made out, from the rest of the will, to signify the interest. As when a man says, "I devise my estate to pay debts." The heir at law, is not capable of being disinherited while any part of the estate remains unpass elsewhere. This man took plainly his grange and house to be chattels; for he says, he disposes so and so of his goods and chattels, not specifically disposed: Namely, "I give the grange to my son." A gift of chattels would have been absolute.

He gives a particular estate for life, and remainder for ever, to his grandson, the son of the heir at law; then this estate for life to *A.* and then equally to *A.* and *B.* her daughters, according to the custom.

What can this mean? not the saving of another man's right; he could not have given the estate, so as the lord should have lost his admittances, &c. such meaning would have been superfluous and ridiculous. But it has a meaning, as signifying the intent of testator to pass a fee; as he knew, *by the custom of the manor, lands were inheritable.* I consider it as a fee to the grandson. I rest not a little on the testator's eventually intending to pass his whole estate, afterwards expressed by that sweeping-clause, of all his goods and chattels not specifically disposed; and accordingly discharge the rule,

On the Will of Thomas Rowse.

[97] **T**HOMAS Rowse, the testator, was possessed of a chattel interest, and styles himself yeoman in the will.

He devises to his wife 10l. out of one of his farms, settled on her before marriage; straw to thatch an house; and an hogthead of cyder. He makes *Anne*, his daughter, an infant of three years old, his whole executrix.

And whereas his wife is with child by him, if she have a child after his death, to such child, if male, two third parts of his estate; if a daughter, one half. Then *J. Rowse* and another made executors in trust.

And in case his daughter *A.* and the after-born child happen to die, then remainder over.

The event of a posthumous child did not happen; and it was questioned, whether the remainder over could take effect, the contingency precedent having never happened.

And

And, 2dly, If it could take effect, when? and what was the meaning, "if my daughter die?" What event was it to mark, on which the remainder might vest?

It was not so much argued on the point, where the remainder could vest, (the posthumous child, who was to take first, not having been born,) as on the second point, what limitation was created by those words, "if my daughter die."

It was contended, that it meant *before my death*; and, if so, that the remainder could not vest, as the daughter survived the testator.

It was attempted too, I think, to be argued, that "if my daughter, &c." was insensible; because she must die, and therefore the remainder could not vest at all.

On the other hand, it was argued, that here was some contingency certainly meant to be supplied: It could not be taken to express a general contingency of dying some time or other, which the testator knew must happen; but must mean some particular contingency.

In case my daughter die, and in case the other above-mentioned children shall die, this is expressed as a contingency, though, if taken literally, it's certain. 'The supplying a contingency is where the contingency is necessary. By legal necessity, I understand such a violent presumption as will admit no contrary presumption. *Corrington* and *Heller*, before Lord *Hardwicke*. In the case of *Chapman* and *Brown*, before your lordship, this court would not supply a contingency, to destroy remainders. I presume, the reason is, that every part of the will must be performed according to the intention. I conceive, this governing rule here applied, will the most secure possession. I here understand the testator to have had great dislike and distrust of his wife. He intrusts the care of the education of his children to his sister-in-law, *Anne Rowse*. He considered it might happen, that the wife, if his children should come of age to dispose, might induce them, from their filial love, to give their whole share to the mother; if not, she would come in for her distributive share. "If my daughter *A*, die, and the other after-born children die."

[98]

"If my daughter *Anne* die"—When? Before my death, 'tis said. And the other after-born children die"—When? Not before my death, for that implies a contradiction; and we are to supply two different contingencies? one to suit one part, and the other another part. Certainly, if she die before she come of age, or if she die unmarried.

ried. Otherwise, what we contend for, that the wife should not come in, would be overfet. *Chapman and Brown*. We can't on arbitrary conjectures, however probable, supply omissions.

Serjeant *Glynn*—The courts of law have never introduced confusion of the executive and legislative power. The intention of the will, considered on the whole, will certainly govern. In this case, *A.* has a wife, a daughter, and a sister. He considers the daughter as the sole present object, and accordingly gives her all; but, recollecting there may be some posthumous children, he makes the usual provision of two third parts, if a son; if a daughter, to share equally. Then are the words, “If my daughter *A.* die, “and the after-born child die.” These words are understood, on all hands, to be obscure. Mr. *Heath* has contended, the court will not supply two contrary constructions—I suppose this rather a technical distinction, than such an one as courts are usually governed by in the construction of a will. We do not want here, however, to supply a double construction. If my daughter die before she is of age to dispose: I submit, the apparent intention requires the construction should be, if they die before they are of age to dispose. This is a question of a personal estate; it's a family provision: 'Tis not like the disposal of a real estate in several branches; more for perpetuating a name, very often, than for other considerations. It's the great part of the benefit of such a gift, in our case, that when the parties come of age to dispose they may have the absolute power. If a posthumous son should have been born; if it had been understood, “if such posthumous son die unmarried,” the personality might be to remain forty or fifty years useless: That would be absurd in any case; incredible in this case of ours. I contend here, no estate is defeated by this construction: That a reversion is given to the brother and son of the testator, is begging the question; and therefore, I urge the lessee of the plaintiff has no claim.

Lord *Mansfield*—*Thomas Rowse*, the testator, was possessed of a chattel, and was a yeoman.

Devise to his beloved wife, of 10l. out of one of the farms which he had settled before her marriage; straw to thatch a house, as much as she should choose to thatch him; and an hogshhead of cyder. *Anne*, whole executrix, who was three years of age; and, supposing his wife ensient, if she have a child after his death, to such child, if male, two third parts; if a daughter, one half. Then *J. Rowse* and

and another made executors, in trust; and in case the daughter and the after-born child happen to die, then remainder over. The idea, that courts are to find out the intention from the general view of the will, is right; and, considering the great abuse of language every where, the ignorance of particular testators, and even of those who make wills for them, that meaning cannot be found out by the accuracy of expression. If the letter is taken, the lessee of the plaintiff can't take; for the contingency has never happened; the posthumous child has not been born. One of the oldest cases that has happened in the world is, where a testator has taken for granted a contingency which never happened, and therefore founded a limitation over, what shall be the fate of this limitation? This was the case of *Jones and Westcombe*, in Chancery. I believe, in the printed case, a long string of cases will be found, cited by me. Upon another case, the court of Common Pleas was of one opinion, this court and the court of Chancery of another. The case of *Grassius and Scavola*, in the time of ancient Rome, was precisely this: It had long been contended, that where the contingency did not take place that was primarily in the view of the testator, devise over was gone. It now seems established, that if what was the original object of the testator hath not happened, that yet, what he intended further, should take effect. On the will of *Presgrave*: This was a devise to a child, of whom testator's wife was enſient, which should be born after his death. The wife had several children, all in the testator's life. It was there held; that the child, who was to have taken if posthumous, should take: As there was no reason to think, if he meant the child to take if born after his death, on the presumption that it would be so born, during his life. To consider the will particularly: *Anne* was made whole executrix; she was but three years old: He can't mean she should act as executrix; he understood that, by making her executrix, he gave her the residue. He appoints executors in trust; he appoints his sister to take care of his daughter: No other son or daughter was born. The daughter lives fifteen years after coming of age. The testator does not appear to have had any great affection to his wife: He gives little but what he must. The dying must be understood a contingent dying; "in case she die," cannot be understood otherwise. The contingency, I take to be, the dying before a capacity to act as executrix: In which contingency, he

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he had rather the devisee over had taken than the administrator.

Chesterton *against* Chesterton.

For Certificate out of Chancery.

“**I** Give and bequeath all my freehold and copyhold estate.” Whether this be a devise in fee, or for life; there being no farther limitation?

Lord *Mansfield*—The general rule, to be sure, is, that without words of limitation, an estate for life only passes. But, I believe, whenever it takes effect, though it must stand as a determination, I am afraid the testator’s intent is disappointed. But in a case where the word *estate* is used, it shall be taken, the full right and inheritance; unless where it’s plainly so restrained, that it must be synonymous to *land*, “As all my estate or land lying and being;” *expressing locality*. But here is technically and accurately, “*freehold and copyhold*;” these are estates of *inheritance*, and pass as such by that description; and in 1746, in a case from Chancery, *Snees and Cornwitt against Dell and Cornwitt*, this court was of opinion, when the testator had several estates, freehold and copyhold, equity of redemption, &c. seven or eight different kinds, and said, “I give *my estate* to my wife”—this was said to mean for life only; for the mortgage could not be given her in fee. On this, the court held clearly, that of such estates, of which an inheritance could lawfully pass, *viz.* the freehold and copyhold, the inheritance passed to the wife.* We shall make our certificate, therefore, accordingly in the case, if we don’t alter our opinion; which we don’t imagine. We will let you know.

In this case farther, from a view of the will, it appears that the testator has given a plain inheritance to his eldest son in another part, in the same terms, “estate.”

* Verba generaliter dicta restringuntur ad habilitatem rei vel personæ.

Hilary Term,

13 Geo. 3. 1773. K. B.

Doe, on Demise of Burville, *against* Burville.

THIS case was argued in the King's Bench, *Michael-* [101]
mas term, November 1772. Special verdict.

A. devises in trust to *B.* for the use of his wife; and after her decease, to the use of his son *D.* for life, without impeachment of waste, remainder to the heirs male of his body; and in default of such issue, to the heirs female; remainder, in like manner, to his other sons; remainder over to the use of his daughters, as tenants in common, (if two or more,) and not as joint-tenants.

Remainder to the heirs of his brother *Abraham* for ever. All the sons die without issue. The daughters die, being seven in number, in the life of the survivor of the two sons. Question, whether cross remainders to the daughters can take place?

It was pleaded in this manner, in favour of cross remainders.

Mr. *Le Maitre*—This being the construction of a will not of a deed, and not being to the disinherison of an heir, for this reason, cross remainders, by implication, though by the general rule of law not admitted except in express words, will be thought within the reason of the law; notwithstanding the *dictum*, that cross remainders shall not take place where more than two.

4 Leon. 14. called by Lord *Hardwicke* the leading case. Cro. Ja. cited. *Dyer* 330. The testator had a son *H.* and two daughters, and messuages in fee; one of 24 shillings value; the other of 26 shillings. *H.* had issue two sons, who died, living the father. He devises one messuage to his daughter *Alice* and her heirs for ever and, the other to
Thomasin

Thomasin and her heirs for ever; and upon the death of either respectively without issue, he gives over her part to the other, and her heirs for ever; and if both die without issue, then to his two grandsons.

Three of the judges thought it cross remainders to the daughters.

Dyer 300. A man had five sons, his wife ensient of the sixth, and he devised the third part of all his lands to his son and heir; the other two parts to his four younger sons, by name, and the heirs male of their body begotten; and if the *enfant en ventre* was a son, then he to have his fifth part with his four younger brothers, as coheir; and if all five died without issue, reversion to her right heirs for ever. The sixth son died, and three of the younger. Adjudged, the survivor should have the two entire parts.

Holmes and Meynell, 4. *Raym.* 425. *A.* devises lands to his two daughters, equally to be divided between them; and if they die without issue, to his nephew. The eldest daughter died without issue; the other daughter entered. Question, whether her entry lawful; and whether the devise took place to the nephew, on the death of one of the daughters only? The court considered it as a cross remainder.

Cole and Levinson, (*Ventris.*) Implication of cross remainder taken, not good, on account of express words to the contrary. *Cumber and Hill*, Hilary term, 7 Geo. 2. On a special verdict on ejectment, Lord *Hardwicke* observed the authority of the case of *Holmes and Meynell*. Difference taken there, as the devisees were of equal relation.

Brown and Williams, Lord Chief Justice *Lee* cited, to prove contingent remainders might be by implication. But it was said, from Lord *Mansfield*, that Lord *Hardwicke* gave his opinion to the contrary. And Lord *Mansfield* cited another case, where it was held that a cross remainder was bad; because, though on the event there were but two, there might have been more; and so not good in creation.*

Before Lord *Northington*, *Wright* and *Holford*. On Mrs. *Holford's* will, 1767, several limitations to sons, a limitation to daughters, not thought good; because there might have been more than two. Lord *Northington* did not take that opinion to be law; determined otherwise: And on appeal

* Quod ab initio non valuit, tractu temporis non convalescet.

peal to the House of Lords, judgment according to that opinion.

Before Lord *Camden* a case was argued, in which his Lordship said, that cross remainders could not be by deed, but by will. That it had been said, that cross remainders could not be between more than two; but never determined: That if it ever came before the court, it would deserve consideration. That therefore, cross remainders, in the case of children against more remote relations, should be thought admissible, on the great authorities by which Judge *Doddridge's dictum* is overset, of remainders between more than two. These considerations will, I hope, entitle me to the judgment of the court; and, in consequence, a verdict for a moiety.

[103]

Serjeant *Hill*—I understand the argument had to be divisible into two heads:

The first is, that there is no force in the doctrine of cross remainders by implication, between more than two. If it has been received as established by judges, counsel, and conveyancers, I profess, *stare decisis* is, in my idea, the best rule; and I trust that the court will not overset a resolution so taking rise, so nourished and matured. I assure myself, I shall prove it not to be the *dictum* of *Doddridge* only.

2 *Roll's* 471. A cotemporary judgment to *Gilbert and Witten*, says, it was not the opinion of *Doddridge* only, but of three of the judges who sat, against the Lord Chief Justice. Lord Chief Justice *Pemberton* understood thus in the case of *Holmes*, 2 *Jones*. The case of *Gilbert and Witten* agrees with the case here, only with the difference of being between two; for it cannot be between three or more. I understand Sir T. *Raymond's* argument, which he has reported in the same manner. Let me take notice of the first case, *Dyer* 303. The case there was not looked upon to be law: The words are "*il semble*," which implies a reporter's opinion only. It was cited in subsequent cases, alluded to, but not admitted to be law. *Hales* said, Nor would it be if it was in a will; for cross remainders cannot be between three or more, without express words.

The next in which the doctrine was received, that cross remainders cannot be between more than two, is *Williams and Brown*. There it was said, the court relied on the case of *Coomber and Hill*; and said afterwards, that cross remainders cannot be to more than two: This is not the only case. *Marriet and Townley*, 1. *Vez.* Lord *Hardwicke* says, with express words, "there might be cross remainders

ders to more than two, with express words:" Doubtless, they might; but we say, not without: And this appears to have been the opinion of some of the ablest judges that ever sat on the bench. I understand the case to have been very different before Lord Camden; it being on articles for conveying stock, and articles being executory.

[104]

The case of *Wright* and *Lord Cadogan*, cited on the other side as *Wright* and *Helford*. If I may be expected to speak something of reasons, (which, in a question drawn from obscure antiquity, perhaps is not necessary) Lord *Hardwicke* considered it to be the avoiding splitting of tenures. Other reasons have been attempted; but I contend for it as a fixed maxim of law, which it is now too late to shake. The predilection of a testator to his own children, preferably to remote relations, has been argued. I don't deny it to have weight; but I say, no question was ever determined on it singly.

I come to the second question, Whether, whatever may have been the general rule, any implication may be raised here, from the words of the will?

Comber and *Hill*, Lord *Hardwicke*. "The rule is, and
" I know not a better or clearer, to make cross remainders
" there must be either express words, or necessary implica-
" tion. The words, when to take place by necessary impli-
" cation must be such as cannot be satisfied by any more than
" one construction." I apprehend too, that cross remainders are in the nature of a jointenancy; so that, here cross remainders would be contrary to the words of the will, which expressly exclude jointenancy: And when the testator has devised a tenancy in tail, in common, I cannot see how we are to imply cross remainders.

The gentlemen must be driven to say, that the court is warranted, in the construction of a legal devise, to insert words between the substantive devise and the last contingent remainder, to create cross remainders. I conceive, it stands totally indifferent, whether the testator meant to raise cross remainders or no.

In the case of *Leach* and *Jackson*, 1771, Lord *Aspley* said, the doctrine in the case of *Wright* and *Lord Cadogan* did not, he understood, overset the doctrine we contend for.

In reply, Mr. *Le Maitre*—The case of *4 Mod.* has never been answered. As to the stress laid on jointenancy, the testator is *inops consilii*; and other meanings might be understood of that word; as that they should not take jointly, to the disinheriton of those in remainder. Intermediate words
do

do not appear necessary to be inserted here, when the remainder is to a remote relation. With regard to *stare decisis*; I always thought, that there should be a reason which either continues to exist, or existed at the time, or at least no reason to the contrary; *et malus usus abolendus*.

Lord *Mansfield*—It will be proper to argue again. It has been very well argued; but I would wish the order inverted the next time: First, “By considering what the intention is;” and then, “Whether it will be good, or otherwise, by any rule of law.” It’s observable, that the estate is divisible into three parts: He devises to his sons for life, successively; with remainders to the heirs male of each respectively; remainder to their heirs female respectively: So that the heirs female must take before it descends from one son to the other. He limits to his daughters, not calling them heirs female, but daughters; then in a familiar manner, to be drawn technically afterwards, with remainders. [105]

As to necessary implication, That is now admitted to understand highly probable implication. As to confusion, If the daughters died without issue, and there were six more, it would create as much confusion by descent as by cross remainder. If in the case before the House of Lords; the question was expressly on that point, it will have great weight; but if it was *in transitu*, it will have much less. What Lord *Hardwicke* said of necessary implication, must be understood in the general view; or otherwise it must be by express words, and not implication. Let the whole will be added to the case.

The entire case appears to be this, which I had from a draught shewn me by a friend, and which appears very accurate.

The testator was possessed of three estates: His capital messuage, and lands thereunto belonging; an estate at *Headcorne*; another at *Boxley*; all in the county of *Kent*. By his will he devises his capital messuage, and the lands thereunto belonging, to his wife for life.

Remainder to his eldest son *James*, in tail male; remainder in tail female.

Remainder to his second son *John*, in tail male; remainder in tail female.

Remainder to his third son *George*, in tail male, with like remainder.

Then follow these words, “And for want of such issue, “to all and every my daughter and daughters, as tenants
“ in

“in common, if more than two, and not as joint tenants,
“and to the heirs of their bodies issuing.”

“Remainder to the heirs of my brother *Abraham* for ever.”

The same disposition of the estate at *Headcorne*; only the second son is preferred, and the eldest named last.

The same as to the estate of *Boxley*; only the third is preferred.

[106]

The like remainders to the daughters, in the same words.

The like remainder to the heirs of *Abraham*, in fee.

The testator had three sons and seven daughters. All the daughters are dead in the life of the surviving son, *John*, who is dead, as all his brothers, without issue.

1000*l.* portions given to his daughters, to be paid on the day of marriage with consent of his wife. 30*l.* *per annum* if, after coming of age, they should choose to live separate.

Devise of 10*l.* *per annum* to his brother *Abraham*.

This was tried in the assizes of the county of *Kent*. Question, If cross remainders to the daughters?

5th *February* 1773. Mr. Cox—This gentleman, though perhaps not possessed of a very large fortune, seems desirous of making a very strict settlement.

The whole will is now stated, pursuant to the directions of the court.

If there was a doubt what was the intent, I hope it is now clear. He appears to have had an inclination very strong, to keep the estates separate. If cross remainders can take place, then part of the estate may be in the daughters of *James*, and part of the same estate in the heirs of *John*.

These words I look on as very remarkable: “And in default of such issue, to all and every my daughter and daughters, if two or more, &c. as above.”

“If two or more,” is expressly, as if he had said, more than one. If the six daughters die, is it possible that the surviving daughter should not take the whole, before the heirs of his brother *Abraham*? Then, if on the death of any daughter, the part of that daughter was to go to the heir of his brother *Abraham*, yet on the survivorship of one daughter after all the rest, the whole would be to be retained, how is this to be conceived? He says too, “her and their bodies,” using the singular number. Then remainder to the heirs of his brother *Abraham*, who could be no particular person he could have in contemplation, the remainder being to take place after the death of his ten children. I must observe, with respect to the case of *Gil-*

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bert and Witten, that it, and the cases which have been governed by it, which have been very few, stand principally upon the single *dictum* (very respectable, indeed) of Justice *Doddridge*. [107]

The intent of the testator has always been very strongly considered: The limitation over has been in favour of a person in being. The understanding of words in devises has great difficulty. The court, in *Gilbert and Witten*, says, "The testator having given several messuages *distinctly*, to several persons, there is no cross remainder; the testator's express intent being to keep the estates separate." Mr. Justice *Doddridge* said, "*Cross remainders cannot be by implication between more than two.* The estates having been given severally here, cross remainders would be against the intent." Great opinions have been against that of Justice *Doddridge*. *Holmes and Maynell*: The contrary opinion was declared more consonant to the intent of the testator, which ought to govern. As to the opinion of the court in that case, founded on the expressions, we may well admit it. Lord *Northington* took notice of the *dictum* of *Doddridge*, which, he says, he did not know had ever been solemnly determined.

2 *Roll's Rep.* 224. Here the original limitation was in favour of two strangers; remainder to the heir at law.

Dyer 330. In this case the declared project of the testator was to keep the estates separate to the issue of his eldest son.

"To the heirs of their bodies respectively." Here the plain intention was, to keep separate; and the remainderman was in equal degree. Lord *Hardwicke* laid great stress on the word "*respectively*:" That it was the same as if a moiety had been given: *That it cannot be understood by implication, that the testator meant to give over his estate, while heirs of his own body were still living.* *Brown and Williams*, 2 *Strange*; here, too, was the word "*respectively*."

Cole and Levinson. This was on covenant to stand seized to uses. The court said, it would have been otherwise in a will.

Dyer 303. I believe, Lord *Hardwicke* calls the leading case: A man had five sons; his wife ensient of a son.

4 *Leon* 14. There the limitation was in favour of sons; the remainder over was to a stranger. An heir who might be an hundred years hence, seems equal to a stranger. Case of *Holmes and Maynell*, *Skinner*.

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The court said, "*That to give against the child of the testator, would be against nature.*" That even the words would not be sufficient, any more than the intent; the words being, "*If they die,*" which cannot be satisfied by the death of one. He said, he approved the distinction of *Doddridge*. What he might probably consider as the distinction here, I can't pronounce; but, as he declares the estates given separate, were to be kept several, it takes it out of our case.

Wright and Cadogan. Lord Northington had so preposessed himself in favour of cross remainders, that he would hardly suffer Mr. Yorke to argue it.

Twifden and Locke, before Lord Camden. Question, Whether cross remainders?

Lord Camden said—"I am clear cross remainders cannot be in a deed by implication—Courts used to lean against them. *Doddridge*, arguendo, said, That cross remainders cannot be raised by implication: *If it comes to be argued, it will deserve consideration.*" The word *respectively* had great stress laid upon it. In the other case, cross remainders would have been allowed, if it had not been for the word *respectively*.

As to inconvenience, Suppose *Abraham* had had seven daughters: Take the other part; will not the confusion in that case, on their side, be equal?

It has been argued in favour of relation—Here is a regular gradation: First, the sons; then, the daughters; then, on all their dying, &c. the remainder to the heirs of his brother *Abraham*.

The words *with remainder*, I hold to be of great force. A remainder I understand to be, what I have not disposed already. It appeared on enquiry, that the testator died about four months from making the will.

Lord Mansfield—Are you at all agreed as to the age of this man and his wife?

Answer—Whatever his age was, it appears by the limitation to his daughter, he had not in contemplation any daughters hereafter to be born:

Mr. Justice Ashurst—After limitation to his son, limitation goes immediately to his daughters: So that he had no contemplation of having more sons.

Mr. Wallace—We are to consider, Whether the intent of cross remainders to be created, was in the testator. [109] Next, Whether the rules of law will maintain it. To the sons it was clearly an estate tail; their daughters were not to take by purchase; there could be no cross remainders between

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between them. The daughters of his sons are preferred to his own daughters. We are not in the case of persons entirely unprovided for.

If a meaning in favour of such remainder can be made out by the words, the rule of law must take effect. I don't see any difference in the words, "for default of issue," to ground a strong distinction upon.

The undivided estate is relied on much: But making them tenants in common is equivalent to cutting it into seven portions.

In the case of *Dyer* 303. the words governed.

In the case of *Leonard*, the words *whole estate*. For it cannot be taken, that on the death of one the other should be ousted by the remainder-man.

The case of *Holmes and Meynell*.

Case of *Wright and Cadogan*. If Lord *Northington* determined without argument, according to Mr. *Cox*, I presume it's left open for argument. Here the matter in question was, as to validity of articles of appointment: This part of the case did not come into consideration. The parties, I know, still understand that matter to be open to argument. I therefore apprehend, the decree of the House did not decide this point.

The case determined by Lord *Camden* was on articles of marriage; refers to the case before Lord *Northington*, which I have relied on to be open to argument.

As to the rule of law—

The case in *Dyer*, commonly called *Huntley's* case.

This was decided on devise of *an entire tenement* to two different persons: On the death of one, moiety to remainder. This is subsequent in time to the other, quoted by Mr. *Cox* from the same book.

Gilbert and Witten. On the death of one, the whole to remainder-man. I allow here there are three tenements.

Comber and Hill. My Lord *Hardwicke* did not determine on the word *respectively*, but as of additional force.

Lord *Hardwicke*—Cross remainders have never been created by the words "for default of issue." Mr. *Cox* would carry the words to that effect. [110]

Brown and Williams. My Lord Chancellor was of opinion, the case was not strong enough to admit cross remainders, which are never favoured by law, and can only be created by necessary implication. Then the words *severally* and *respectively* were taken notice of, as effectually disjoining.

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Let us see what can be done in raising cross remainders between more than two.

Mr. Justice *Doddridge* says, Although, peradventure, a cross remainder may be between two, yet if there be more than two, cross remainders cannot be without express limitation; because of the great inconvenience and uncertainty.

Justice *Bridgeman*, *Carter* 171.

Meynell and *Holmes*, allowed by Justice *Pemberton*.

Cole and *Levinson*, Justice *Hale* allows it.

Lord *Raymond* had prepared an argument on that ground, which he gives in his Reports; but had not occasion to argue it.

Brown and *Williams*. Lord *Hardwicke* says, On account of the great confusion and uncertainty, cross remainders shall not be between more than two.

Justice *Lee* says, The rule of *Doddridge* has been understood as law.

As low as 1748, Lord *Hardwicke* continued in the same opinion. 2 *Vezey* 105. The law avoided cross remainders between more than two on original grounds, to avoid splitting of tenures. I have mentioned another reason, because of the uncertainty of the estate to be taken by the survivor. By express words, he says, they may.

Lord *Camden* did not judge it determined: He said only, If it was brought in question, it would require to be solemnly argued.

[111] As to this distinction imputed to Justice *Doddridge*, of remainders between two, and between more, it seems to have been considered as law before his time, and has been recognized ever since.

Lord *Mansfield*—If it had been determined in this appeal in the House of Lords, in the case of *Wright*, all the judges would have been called on. A determination would have had great weight. I was in the House, and left it before the decree was made, as nothing difficult was entered into. The decree went on the other ground.

Mr. *Cox*—What I argued was with a view, not of considering whether one estate-tale might be consolidated out of two; but that no son of *John* could take while *James* was living: It was argued, that “with remainder,” has no more effect than “on default of issue;” it seems to me, that “with remainder” has the effect of confining the sense of the words “on default of issue” to the death of all the daughters.

In the case of *Dyer*, the word *all* did not determine.

In the case of *Leon*, the words did not determine.

As to recognizing the words of Justice *Doddridge*, I take the ground of his *dictum* not to be in our law.

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Tenancy in common, it was said, must operate to separate the estates. I will then ask, what is to become of the words "to all and every my daughter and daughters;" and then again, "to the use of *her* and their bodies?"

Lord *Mansfield*—This is a case, which has been greatly agitated for above a century; and it will require being spoken to with precision. Let it therefore stand over. 'Tis a rule of property; and it is of much greater consequence that it should be determined, than on which side. The testator had no idea of *Abraham's* taking; he carries over to the heirs of *Abraham*; which gives an appearance as if *Abraham* was to take after his lineal descent should fail. This is as in the case of settlements; it is a family provision: 'Tis made in form of strict settlement. Where implication has been received, it has not been by technical words, as in a deed, but by evident expression of intent.

It came to judgment in *Easter* term, 22d *May* 1773.

Lord *Mansfield*—One *George Charlton*, having a wife and three sons, *James*, *John*, and *George*, and seven daughters, made his will in 1770. He gives portions; makes regulations concerning time of payment, consent and the like. He gives a legacy of 10*l.* to his brother *A.* which is no otherwise material than as shewing him alive. He gives some lands in fee to his eldest-son; then, of other estates, first a devise to his wife for life, to *James* for life, remainder in tail-general, like remainder to his other sons; then limitation, to the use of all and every my daughter and daughters, if two or more, as tenants in common, and not as joint-tenants, and the heirs of her and their bodies issuing, remainder to the heirs of my brother *Abraham*. Then, of the second estate, after limitation, to sons as before; and for default of such issue to all and every my daughter and daughters, as tenants in common, and not as joint-tenants; [*the rest as above.*] Then the third estate in like manner, as tenants in common, and not as joint-tenants, &c. with remainder to the heirs of my brother *Abraham* for ever. The testator died, leaving issue his three sons and seven daughters. The daughters all died without issue in the life of the surviving son; the son is also dead without issue: Question, without stating how it arises, Whether cross remainders can be between the daughters? If cross remainders, a verdict for a moiety; if not, a non-suit. 'Tis certain, that survivorship by express terms may be limited. Now, if the intent may be clearly seen, strictness of words is not required by law upon a will. The argument did
not

not so much rest on the intent, as on a rule of construction echoed backwards and forwards. "Tis certain, as to the reason assigned why cross remainders should not be between more than two to avoid splitting of tenures, this might come in by way of argument; for certainly, by law, there might be such remainders. But as this rule has been frequently used in argument, and even judgment, though never judicially decided on alone, we think it ought to have great weight, as far as the meaning goes; which we take to be, "that between two, presumption is in favour of "cross remainders; between more than two, presumption "is against them: But either may be counteracted on evidence of intent."

In the case of *Coomber v. Hill*, cross remainders were disallowed.

In the case of *Browne v. Williams*, for the same reason.

Gilbert v. Witten, between three cross remainders, disallowed.

Cole v. Levinson, Justice Hale said, That if cross remainders were between three, it would not be allowed, unless intent.

In *Mariot v. Townley*, Lord Hardwicke said, That cross remainders could not be between more than two, *unless it appeared by the words plainly to be the intent*. The words in that case were "as joint-tenants."

[113] In *Gilbert v. Witten*, [Justice Pemberton] The court will not effectuate cross remainders between more than two, *unless the intent be plain and unavoidable, so as to force the court to give them*. We will see what intent appears here; now he evidently regards the order of succession; the female line is to take after the male in every one of the estates limited, successively, to his three sons. Then his daughters have their limitation. He evidently presumed his daughters might be reduced to two, or one only, before the time of such limitation taking effect to them. If *two or more* are the words, and they are to take nothing less than the whole, *remainder (in the singular number)* to the *heirs* of his brother *Abraham*, not expecting his brother should live to take; if he had expressly given to his daughters, to take by survivorship, this would have made what the law calls a cross remainder; and he has done it as effectually as if in technical terms. *There would have been no doubt had it been less express in words, for the limitations are so strict in descent, that it cannot be supposed the heirs of Abraham were to take while any descendants of the testator survived, according to the successive descent*

descent he had established. If there had been one daughter, she was to have taken nothing less than the whole; the heirs of *Abraham* were to take nothing less than the whole. *The testator could not have limited cross remainders more clearly and significantly.* My brother *Willes* is of the same opinion. Consequence, that verdict stands for the moiety.

St. John against Errington.

ON a feigned action of a covenant, to try the right of an advowson under a will, as between the devisee and the heir at law.

The words *contracted and agreed*, determined by circumstances of intent to include and pass with effect estate absolutely purchased as well as in contract.

The case then stated appears thus: The testator had a very large estate in diverse other counties, but in the county of *Hampshire* had nothing at all. He had a mind to purchase there for his wife. He afterwards, in consequence of this inclination, enters into articles for the purchase of an advowson. Under these circumstances, and having one advowson, actually purchased, and the contract upon the other being executory, he makes his will, and gives thus: All my advowsons in the county of *Hants*, for the purchase whereof I have already contracted and agreed, to his wife. These, I think, are the very words. Question, Whether the purchased advowson, with that for which he had only contracted, passed?

Lord *Mansfield*, in delivering the judgment of the court, was very brief. He observed, *That the testator considered a purchase as well passing under the expression of contracted and agreed for; every purchase was a contract, and something more.* The testator rightly considered every thing complete, but the mere form of conveyance. He took, therefore, no difference between a contract executory under such circumstances, and one executed. We can't satisfy the intent; and should violate the words, if we did not take it as a devise to the wife of both advowsons.

After the judgment, Mr. *Wallace* got up, and said—To satisfy your Lordship fully, how perfectly right you was in construction of the testator's intent; I may now produce, what was perhaps no legal authority in this stage of the business, the instructions given by the testator in his own hand-writing: "All my advowsons in the county of *Hants*
" already

Words
"contract-
"ed and
"agreed"
determined
to signify
purchase as
well as con-
tract.

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“ already purchased, or for the purchase whereof I have
“ contracted and agreed.”

For what passed in the Common Pleas, *vide infra*.

Arminer, Assignee of Grey; *against* Spotwood.

An execution against a bankrupt adverse, and not procured by him, shall not make a bankruptcy relate to the day of the service of the writ; though a fraudulent use may have been made, a secret judgment shall not bind the goods. Attachment does not seem to mean execution. If the creditor does not proceed to actual execution, but lies by till act of bankruptcy, he shall lose his goods notwithstanding service of the writ; for they are ostensibly the goods of the bankrupt, and as such the creditor shall take them.

ON an issue directed out of Chancery, to try whether the bankrupt became so the 5th of *April* 1769; or on any, and what time——

This case came on to be argued in *Michaelmas* term 1772; and was thus, on a special verdict.

An execution on the 5th of *April* 1769, against the defendant, *bonâ fide*; but kept secret from the creditors till—— 1769: Execution was openly levied, the sheriff's officer lived all the time in Grey's house; some time after, by agreement, Grey paid *Spotwood* a debt of 1400l.

It does not appear of what value, or of what kind, the goods. In the interval, nobody suspected the goods to have a secret lien on them; and he contracted several great debts. On the 8th of *May* the jury find an act of bankruptcy: Question, Whether this was an act of bankruptcy on the 5th of *April*, within the 21 *J. c.* 18. which recites to this effect; Whereas frauds daily encrease, to the great hurt of the realm, &c. and provides, that if a trader departs the realm, procures arrest, or makes fraudulent conveyance, that he become a bankrupt; or by procuring his goods to be attached or sequestered? If the defendant has procured his goods to be attached or sequestered, or made a fraudulent conveyance, he then is within the act; consider him under both these appearances.

It was observed by Mr. Justice *Blackstone*, That the law is very anxious to catch a trader on the first instant of his decline, that he may not wantonly proceed to ruin himself and his creditors. The case of *Slater v. De Matthews*, was an assignment of all; but the * court, in their judgment of that case rested here. Suppose a bankrupt can favour a creditor by an assignment of all, yet the secret conveyance was fraudulent. *Burr.* 821. Justice *Dennis*—An assignment of all is an act of bankruptcy; because it must be fraud. Justice *King*, in the case of *Jacobs*, says, That an assignment of part if fraudulent, is an act of bankruptcy.

It may be observed, that the construction of penal statutes must not be extreme: First, This is not on a penal statute, for statutes of bankruptcy are not considered penal.

[* 115] But I know only one rule, that all statutes must be considered,

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sidered, as ruled in *Heydon's* case, to advance the remedy and public good; this was the opinion of all the judges in the Exchequer. The statute of 21 *James* declares, all laws concerning bankruptcies shall be construed liberally and beneficially to the relief of the creditor.

Whether the execution is taken as procuring his goods to be sequestered, or a fraudulent conveyance, *Grey* is liable on either account.

Mr. *Mansfield*, on the other side—Mr. *Wignore* has properly observed, That we must find the description of a bankrupt in the laws to that purpose.

1st. The execution was not by procurement of the bankrupt, it was a violent act: It was therefore no conveyance or procurement. The statute of *James* says *willing*.

As to the word *attached*, supposing *feri facias* to be an attachment really in itself, yet it was not a voluntary procurement to be attached. I know, by the statute law, from 29 Car. 2^d the time of the writ delivered to the sheriff, by the common law, from the date of the teste, the execution relates; but to which ever it be referred, it cannot affect the bankrupt, for it was not his act. This was not of the bankrupt's procurement. Shall we say it was from the sale? It is complained the bankrupt prevented the sale: So far, then, he rather hinders the attachment. Unless Mr. *Wignore* can prove, that the letting a man continue in possession after execution be an act of bankruptcy, there is none here.

As for bankruptcy by relation, there are but two kinds of it that I know by the law: That of being arrested, and an escape; or being arrested and thrown into prison.

As to the case of *Slater*, it was by collusion between the bankrupt and the principal creditor. Whether a conveyance can be without deed, I will not go to determine; but the want of a voluntary act of *Grey's* in the departing from the goods, is sufficient to throw it out of the statute. [116]

On the other side it was argued, That the agreement was a fraud, by keeping it so long secret from the creditors; and this by reason of an agreement, on account of which *Spotwood* had 1400l. by him from *Grey*. The execution shall be said to have been procured, as the defendant availed himself fraudulently of the execution. Thus a nuisance, by every continuation, shall be a new erection. A lawful entry, and an unlawful act thereon, makes the entry trespass by relation.* In replication.

Lord

* Qui malo intuitu facit aliquid videtur peccasse ab initio.

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Lord *Mansfield*—I should be glad to have all this heard again; it's yet a new case. Whether an execution be an attachment, was soon determined. Whether the execution was for a *bonâ fide* debt? and Whether the execution was adverse? are the two great questions.

If the execution was *bonâ fide* the plaintiff by the statute of *James*, by letting *Grey* continue in possession of the goods, lost them entirely. On a former trial it was proved a *bonâ fide* debt, and the execution was clearly proved; adverse threatening letters were sent; delays of execution threatened therein, frequently procured by the defendant. Having then a leaning, which every man ought to have, to catch hold of any fraud there might be in the transaction, it being of infinite public concern, I had a doubt, whether there might not be a relation to the time of execution, by the subsequent agreement between the plaintiff and defendant, on which the bankrupt preserved his credit, and had dealings continued with him in the shop, by people who had no suspicion of the nature of the transaction between them. It may be found, from the circumstances of the case, less or more criminal. As if it was premeditated; or on the contrary by repeated intreaties, and out of indulgence, without a concerted scheme long before.

I would have the question be, Whether the use made of the execution shall relate to the 5th of *April*, so as to come within the statute of *James*?

I have always understood, with regard to conveyance to create a bankruptcy, that such conveyance must be by deed.

28 Jan.
1773.

Serjeant *Glynn* contended, That the judgment was an act of bankruptcy by collusion, if the words had been less express; for that any collusion would create a bankruptcy. That by the words of the statute it was so: If a trader procure his goods to be attached, it is an act of bankruptcy. The words of the statute of *Elizabeth* authorize me to say it is; and if the statute had not, the spirit of the law would.

[117]

Mr. *Grey*, we assert, procured the *feri facias* to be served on him, and his goods to be levied the 5th of *April*; attachment is said not to refer to execution.

Attachment on mesne process cannot be the evil meant to guard against, nor attachment on the custom of *London*; but an execution is almost the only means, except conveyance of interest, which is provided for separately. An execution is the mischief to be guarded against.

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If any person procures his goods to be attached or sequestered—Sequestration is expressed with a view to Chancery proceedings; attachment to all kinds of seizure by process of law. It is said, in one of the acts of bankruptcy, that sanctuary shall not be for bankrupts. A sanctuary was a word strictly defined, with a proper strict application. There was no sanctuary, in its proper sense, at the time of the statute; yet, that the words may not be nugatory, they were taken to be meant of places privileged from arrest. Attachment has no such confined sense: It has been used constantly, as a much more general word than judgment or execution.

Mr. *Mansfield* has argued the statute of frauds, by which, though formerly relating to the teste, the title is made good from procuring the *feri facias*. But in case of bankruptcy, the execution shall not be complete against creditors upon a commission of bankruptcy, till sale.

Lord *Raymond* 251. Though a writ of *levari facias* be first deliv'd to the sheriff, yet if the sheriff executes a writ delivered afterwards first, this binds the property, and the party must be content to have remedy against the sheriff. The time, I conceive, to prevent a title to assignees, must be the actual seizure of the goods. In this case, the very seizure is infected with fraud.

Small-combe
against Crafs
and Buck-
ingham,
sheriffs of
London.

You cannot, I apprehend, my Lord, suffer transactions of this kind, and say the entry was *bonâ fide*, and the fraud commences at the seizure. I hold it to be a settled rule of law, That he who enters upon a process of law, and abuses it to an illegal act, he is a trespasser *ab initio*.

The officer does not appear as a bailiff: Mr. *Grey* carries on his trade as if nothing had happened.

All this must be understood, therefore, for the benefit of *Spotwood* and *Grey*, by collusion between them and the bailiff.

Burr. 37. *Rice* and *Serjeant*.

[118]

In our case here was a long delay, which can't be understood as fair; but shews that he did not mean to use the writ for his recovery of his own debt, but for the purpose of serving *Grey* against the other creditors. This attachment or execution, therefore, is within the meaning of the act; and, consequently, an act of bankruptcy.

Mr. *Wallace*, for the defendant—The question is, Whether *Grey* became a bankrupt on the fifth of *April*, or no? We are on a question of positive law, which has never been extended by any equitable construction. There are many instances, where the mischief has been as great to credi-

creditors, and the general interests of commerce, as any provided against by the statutes; yet on none of these can your Lordship take an act of bankruptcy to be committed, except where founded plainly in the express words of the statute.

The only words applicable to the case are, "If any person procures his goods to be attached or sequestered, with an intent to delay or defraud his creditors." Attachment is taken by Serjeant *Glynn* to be a process on personal goods at law: Sequestration, on the personal goods in Chancery. There is no such process in Chancery to this effect: There is attachment in some of the courts of *London*, and there is sequestration; both by custom. The effect of the attachment is to bind the goods from the serving of the writ, though execution be not levied immediately. But Serjeant *Glynn* will have notice of the writ to the defendant. Notice is never given to the defendant. In this case an agreement is stated after the entry of the officer. Does this make procuring an execution?

The defendant then on the writ, finding that it was intended by *Spotwood* to have execution immediately, intreats him to stay execution; for he should be ruined in his trade: "Keep it a secret; I may be able to pay in a few days." *Grey* knew not of the writ; he is frightened with an execution in the house. The creditor, therefore, is foolish enough to forbear his right. Afterwards *Grey*, not being able to satisfy the debt, the execution is executed, and the goods sold. He procures an execution, which came on him on a sudden, without a shadow of profit. A trespasser may be *ab initio* in some cases, where the *quo animo* appears from the first by the subsequent act.

If a man uses a distress as his own goods, the law will say, You took it not as a distress, but to use them illegally. So if a man goes into an inn, and takes any of the furniture from thence; You came, the law says to him, not to use the inn, but to steal. If a man suffers goods of his own
[119] to be in a man's hands, and appear the man's own, this does not make the man a bankrupt; but the creditors seize all the goods. In this case there is no enlargement of construction to be made.

Bankruptcy is a crime; considered as such by law; and subject to the most heavy punishment. Shall another man's act, done without my knowledge, be my crime?

Replication. Serjeant *Glynn*, in reply—The mischief which it is contended the act of bankruptcy meant to redress, is very small:

small: The mischief to a creditor, losing his remedy by a secret collusion, is very great. If this be admitted, the practice will be, to have a credit or in every case, take this mode.

Mr. *Wallace* has said, Attachment and sequestration are not applicable to cases of bankruptcy, and that the process out of Chancery, or by custom of *London*, is sequestration, and no where else. I think, I find sequestration in the Ecclesiastical Courts has been taken to be within the statute.

Attachment, I take to be as general a word as possible; and hope your Lordship will think yourself authorized and obliged by the statute, to give it so large an interpretation as may at least not provide against very small and imaginary mischiefs, and leave the way open to the greatest. I am not so different from Mr. *Wallace*, in his opinion. I agree with him, that the matter must be construed, *secund. subjectam materiem*.

Mr. *Wallace* has argued, That if the sheriff's officer comes in with the writ at one door, and the bankrupt, by going out at the same time at another, commits an act of bankruptcy, the writ is executed by the entry, and the plaintiff has his title complete.

If this be the case, then, from the instant of the bailiff's entering, the execution thereby made took a taint from the subsequent fraud.

As Mr. *Wallace* says, You can't see the intent of a man's heart, but by his overt-act. In this we are agreed, the plaintiff acts not from the time of his entry: Till *Grey* having by another act openly proved himself a bankrupt, it was necessary to produce this act, to defeat the remedy of other creditors. Mr. *Wallace* has said, "Shall a common entry treaty for delay to levy execution; shall this, when the writ is served on me by another man; shall this indulgence attach fraud to me?" No, certainly, without other circumstances: But as far as the action is affected with fraud, made evident from the circumstances of the process, then *Grey* and *Spotwood* are answerable together for the whole transaction, from the beginning. The intent of suing out the writ is to be interpreted, from the conduct of the parties, to take its effect accordingly. [120]

Your Lordships will see, the writ was not brought into the house to be executed. I will not pretend to say what act precisely shall amount to an execution; but from whatever act we date it, there is an original fraud in the transaction, to which the execution and all subsequent transactions will

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will relate, and which constitutes a bankruptcy from the first.

Lord *Mansfield*—The question sent by a feigned issue, was to try whether the bankruptcy became so the fifth of *April* 1769; or at any, and what time? The words on which this question is argued are 21 *J. c.* 15. “If any person shall willingly.”

I will state the case, for the use of the students.

A writ was issued out the fifth of *April* 1769, returnable the twenty-third: It was served the same day. The jury state, that the execution was not procured by the bankrupt: But they say, from the fifth of *April* 1769, (it is admitted exclusively on both sides) the bankrupt traded as with his own goods: Nothing was done on the writ. Whether, therefore, an execution on the fifth makes an act of bankruptcy, or the evident bankruptcy on the eighth of *May*?

I was of opinion, that attachment and sequestration were not words to express execution. A secret execution would not answer the purpose; For, on a judgment kept secret, and execution delayed, another creditor may come in in the mean while. There is sequestration by Ecclesiastical Court, City Courts, &c. I see none of the counsel took up my opinion. I thought it might be too narrow.

Serjeant *Glynn* has argued, that the construction by the words of the statute shall be large and liberal. I summoned up accordingly.

As I never find a difficulty to change my opinion, I summoned up according to the jury, that attachment or sequestration may come within the sense of the word execution.

[121] The jury found an act of bankruptcy on the eighth of *May*: A clerk was brought to witness, (not a friend of the bankrupt) who proved the debt, on which the execution was taken, was for a more considerable sum of money than was levied. But after, *Grey* kept paying debts to *Spotwood*, which were not in execution; thinking, very mistakenly, he might avail himself of the secret judgment. He proved many threats of *Spotwood* against *Grey*; but I thought fraud appeared in *Spotwood*'s delaying execution. On the second trial, I expressed myself as if attachment and sequestration meant execution. But, lest any gentleman might be misled by a cursory note on that point, I must declare myself much more inclined to my former opinion. However, I admit procuring the execution may be within the act, it is not on that point I found my judgment.

An

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An act of bankruptcy is a crime by positive law: Nothing can be taken by construction; though great mischief happened not expressly provided for. In the case of *Roberts*, the execution there must have been fraudulently and wilfully procured, to delay or defraud his creditors. I am convinced, the execution was adverse. The assignee would have given in evidence, had there been any ground of supposing of an agreement previous to or co-extensive with the execution, if they could have proved it. But *non constat* when the agreement was made. If it was a day, or hour, or minute later, it cannot be procuring. The agreement indeed acted contrary, and defeated the execution. Accordingly, a second execution was actually levied. It would be very harsh and perilous to draw the line. How many men have been saved by the delay of a day or two! Shall it be fraud to delay three or four days, or after what time? The defendant was totally mistaken in the intent of the execution, which was, that the plaintiff should get his money on the other debt, and then have the benefit of his judgment. He is precluded by the delay: The general law precludes him; and, could that be defeated, the particular says, That a man using goods of another as his own, the creditor shall seize them. What remedy the creditor may have by other ways, concerns not this matter. I am of opinion, this was not an act of bankruptcy on the fifth of April.

Mr. Justice *Aston* was of opinion, that the words *attached* and *sequestered* are not of execution; but are applied where there is an ostensible lien on a secret trust to defraud creditors: Otherwise they would have used the proper words, [My Lord *Mansfield* had observed this] *shall procure an execution to be executed*. The subsequent transaction cannot make it a procuring.

The secret execution was, undoubtedly, *delayed* fraudulently; but no fraudulent agreement to make a bankruptcy. The goods in execution are liable for the creditor; and *Spartwood* must lose them. The creditors may have their remedy; as in the case of *Rice*: But we have no right to construe this, which is *juris positivi*, to be an act of bankruptcy. I express no positive opinion on the former point; but I am of opinion on the latter, that it is no bankruptcy.

Mr. Justice *Willis* inclined to think attachment and sequestration would not take in execution; because arrest was subjoined, on mesne process; said he was precluded from taking the agreement to have been before the 5th of April, [122]
by

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by the finding of the jury: And whatever he might otherwise have thought, he was now bound, by a positive finding, from questioning that point; and, that being admitted on the finding, he was also precluded from construing the act of bankruptcy to refer to the execution on the fifth of April.

Mr. Justice *Ashurst* expressed his concurrence with his brothers on the bench, on the doubt of attachment and sequestration, referring to execution. He considered the case as decided on the other point: The procurement of the execution by *Grey* not being proved, without which no subsequent act could make a bankruptcy.

Hatton against Hooley.

Before the Lord Chancellor, on the Construction of the Effect of a Devise of a Codicil added to the Will of Lady Isabella Finch, on Appeal from Sir Thomas Sewell, Master of the Rolls.

THIS case came on to be argued *Michaelmas* term 1772, and was thus:

Lady Isabella Finch gave by her will to *Lydia Hooley* five hundred pounds: She then gave an annuity by a codicil; afterwards she gave by another codicil a thousand pounds. The words were these—"I add this codicil to my will: I give to *Lydia Hooley* a thousand pounds."

Mr. Solicitor-general—It is of little consequence what rule of presumption is established, where intention stands neutral: But it is of great consequence there should be some settled. In the case of portions, the last declaration of intention has been understood to take in the full and whole intention. *Bruin and Bruin*, (*Peere Wms.*) and others.

For the case of legacies particularly, *Masters and Masters*. There was reason to think an addition was intended; for between the will and codicil the testatrix had received a very great accession of fortune. *Duke of St. Alban's* and *Beauclerk*, (*Atkins.*) Lord *Hardwicke's* opinion in the case is incorrect; but we may easily conjecture what was delivered. Lord *Hardwicke* went on the civil law, as this court has a concurrent jurisdiction with the ecclesiastical: And with the view of settling the opinion, four rules are cited from the civil law.

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1st. The same specific thing given twice, can be paid but once.

2dly. Equal sums of money, or goods of the same value, [123] will pass but once.

Dig. 29. l. 12. from Ulpian. Si eadem summa bis scribatur div. Antoninus rescripsit, solvendam duplicatam; si evidentissime probetur testatorem ita voluisse: Therefore the legatee must prove. Lord Hardwicke says it's the same, by the better authorities, if in a different instrument, as in the same.

Dig. If an 100l. be given, and afterwards 50l. if intention be proved, both must be paid; if otherwise, not: Idem esset si in codicillis esset factum. Celsus, however, is quoted as an opinion by Lord Hardwicke, saying that the heir must prove the negative of the intention. Gothefrid says otherwise; and that the heir is bound to the smallest sum: Lib. 37. c. 2. tit. De Legat. The case is cited. If two copies of a will, 100l. in one to Titius, 50l. in the other, utrumque legatum nequaquam, sed tantum quinquaginta aurea, the law of the code de codicillis does not seem to point. Lord Hardwicke cited Lib. If a legacy to a daughter by a will, and afterwards a portion, the daughter shall not have both.

Another not in the note of Mr. Atkins, a more direct authority 34 *Dig. 1. l. 18.*

A person had several *liberti*; some he had freed by his codicil, others by his will: *Quos testamento manumisit, iis decem mensiuos alimentorum nomine, legaverat;* and then to those whom he had freed by his will; seven by his codicil, and seven also to the *liberti* he manumitted by his codicil. The determination was, The *liberti* manumitted by his will were not to have seventeen or ten, but only seven; and its being said *alimentorum nomine*, Lord Hardwicke said, it would make no difference; for might not a man bequeath a double maintenance, as well as any other double legacy?

Celsus, on the adverse side, is the only authority. If it's necessary to balance authorities in civil law, *Ulpian* is a much higher authority. *Papinian* is the first authority, *Ulpian* the second; they were both *præfæti prætorii* under different emperors. The text, it's said by Lord Hardwicke, the text is to be regarded, and not the commentators; the reason is also very good. Of the commentators, the first were soon after the finding of the *pandect* at *Amalfi*; these were men in most barbarous times, about the 13th century. The second class were schoolmen and casuists; this second class we may guess the merit of, if it were to be known no

other way but by hearing their profession. The third were not practical lawyers, but mostly *French* and *German* professors; these lived in more enlightened times, and so far are much preferable to the other two, but will hardly be classed with the text. The *Dutch* and *German* commentators took much pains to support what *Trebonius* had vainly boasted, that not one adverse opinion was to be found throughout. And *Justinian* forbid, as vainly, any man to interpret the code differently; one commentator endeavours to reconcile seven hundred different opinions. Among the ancient lawyers there were sects as among the philosophers; *Labes* and *Capito* were of different sects. One of the commentators says, *Legatarius dicitur probare cum non probetur in contrarium*; or to that effect.

If one turns to another set of writers, they run so much on generals, that it's difficult to make out an opinion; but they agree, that if a gift be twice for the same thing, it shall be paid but once.

Here is a legacy to a servant for service; which, I think, amounts nearly to the same thing.

[Will was read.]

30th August 1768.

Devise to her brother of her house [in *Berkley-square*,] and of her furniture not otherwise disposed, charged with diverse legacies. I “give to my woman *Lydia Hooley* 500l. “to be paid in three months after my decease; to her sister “30l.” Then appoints executors.

Codicil, 31st October 1768.

“I Lady *Isabella Finch* desire this may be considered as “a part of my will: I give an annuity to my servant *Lydia Hooley* of 12l. for life, over and above what is given in the “will; I give an annuity of 30l. to my servant *Smith*, in lieu “of what I had given in my will.

Second codicil, October 28th, 1769.

“I add this codicil to my will: I give *Lydia Hooley* 1000l” And farther orders, after the codicil to her servant *Lydia Hooley*. “I farther order the sum of 60l. to be paid to *Rebecca Hooley*,” [the sister.] Now this case, before Sir *Thomas Sewell*, Master of the Rolls, was taken to be a legacy of the sum in the will, and in the codicil.

Mr. *Jackson*—I am in a worse case than the commentators, who came after the original writers; I will say little therefore. It's incumbent on the legatee to prove the intention, for without intention there is no will: What would it be *inter vivos*? A man is in debt 100l. he pays the 100l.

This,

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This, though not expressed as payment, will in common sense be understood payment, and not a gift.

How is it here, a codicil and a will are the same instrument.

The civil law-books, your Lordship will observe, are singly on the consideration of two equal sums; but where the second legacy is an augmentation of the first, 'tis easy to suppose the testator altered his mind, and encreased the legacy in the will. I shall only cite one authority to what has been so fully argued: *Verius puto ut probet legatarius; nam ei qui agit semper probatio incumbit*, [The words "over and above what is given in the will" were relied on, to prove a more than ordinary anxiety of saying when she gave over and above.] [125]

On the other side, Mr. Attorney-general—This is a case of a legacy of 500l. in general terms; and another, in terms equally general, of 1000l. by a codicil. I would endeavour to cite what appears to me in the will and codicil, because I think the intent of the testatrix may be sufficiently collected. In her third codicil she says, "This codicil I add to my will;" this implies an additional legacy. I take it universally understood, a codicil is taken, *primâ facie*, not to be the same instrument with a will. *Swinburn, Burn, Wentworth, &c.* define it to be a less solemn instrument, altering, adding to, explaining, or subtracting from a will. *Swinburn* says, If there be two wills, the last revokes the first; but if two codicils, the claimant on each shall have title: Only *Gothefrid* is of different sentiment; the *incumbit actori* is, where *legatarius* produces *duas scripturas*, it lies on him to prove both to be the act of the testator. But, that proved, it lies on the heir to prove *posteriorem esse inanem*. 9 Dig. lib. 9. Lib. 37. tit. 2. where a testator has shewn great marks of understanding and affection, I think it will be understood that by such, where a title is expressed in one place to a legacy, suppose, of an 100l. and afterwards of 200l. both will be understood. If there are marks of impossibility, and no evidence of much affection, a difference may be taken, and forgetfulness pleaded.

Where it is said, *Si Titio centum aurei legentur, & in alio scripto quinquaginta aurei, utrumque nequaquam debetur, sed quinquaginta aurei tantum debentur*; that is, *primâ facie* no intention appears which, or whether both, or no, the testator meant to give. Therefore, on the common maxim, "*Melior est conditio possidentis*" the heir will not be to pay till proof made of title by legatee.

In the case where it was said, Whereas I have given to A. 1000l. I now give her 1600l. Here was particular notice taken of the former bequest, and intention plainly expressed of augmenting that legacy, not of super-adding a new one to it. I therefore humbly pray your Lordship, that the judgment of the Master of the Rolls may be confirmed.

It was observed, That by the civil law there was no testament without an universal heir, and the contest was between the legatee and him. If any thing takes this out of that reason of the civil law, it will take it out of the rule. The brother of Lady *Isabella Finch* has a particular fund charged with specific legacies; and three young ladies, his daughters, have the rest of the personalty.

The annuity is not charged particularly, nor the 1000l. They are not charged on the house or furniture; and therefore the young ladies are liable to them, and they must be paid out of the residue.

The latter legacy being at all events payable, the only question is of the first; and that contest is not between legatee and universal heir, but between one legatee and another.

Note. It seems on the whole, that the 500l. in the will was not thought charged upon the devise of the house and furniture.

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It was farther observed, That the bounty of the testatrix seemed progressive; and that the slightest proof would be sufficient against the presumption, which was at first always made in favour of the heir.

Mr. *Jackson*—In the case of the *liberti*, the use of the codicil is properly explained to be, to add, alter, or explain: There it was used to enlarge the objects of her bounty; in our case to enlarge the bounty. It is true, a codicil is not a part strictly of the will, but an addition made on deliberation to a will. The testatrix says, “I add this codicil to my will;” she takes notice of it, as if she recited. And therefore, I would desire your Lordship to observe, that she gives the 1000l. by way of enlargement of the former legacy; instead of the 500l. 1000l. is given. It seems to me the case of *The Duke of St. Alban's v. Beaucherk*, where the Dutches begins her codicil by putting the reader in remembrance of her will. 'Tis said, the legacy is made payable at different times; the testatrix, writing these short directions, might well omit the time of payment here; and we might contend, with as much appearance of probability, that the codicil being to alter and explain, where it does not alter, as in the time of payment, the enlarged legacy is payable at the end of three months.

Mr.

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Mr. Justice *Aston*—Do you recollect *Wallop v. Hewit*, where equal legacies were given, 2d Chancery Reports? *Charles 2.* Lord *Shaftesbury* in this court, with the judges, on reading the will and codicil, adjudged both legacies were payable. *Swinburn*: If a sum is twice bequeathed, it is twice due, if bequeathed in two different writings as a will and codicil: otherwise not.

February 6th 1733.

Lord Chancellor, assisted by Mr. Justice *Aston* and the Lord Chief Baron *Smith*. I was not present at the first opening of Justice *Aston*'s opinion; but he seems to have introduced it, by saying that there was no internal evidence of intent that could weigh considerably. That the rules of law, collected from the *Roman* lawyers, and what he should still have a much higher respect for, the decisions of this court given in several cases, would be the only guide. That it had been said the proof lay on the legatee; that a codicil and a will was the same as if in one instrument; and if two [129] sums, the last should be paid.

Lord *Hardwicke*, on the Dutcheſs of *St. Alban*'s will, made a decree upon that case, which has been represented as a general decision, not a decree on particular circumstances; as taking no distinction, in any case, between a will and codicil; as laying the whole proof on the legatee, and the strongest presumption in favour of the heir. His Lordship, in this and in many other cases, will speak much more accurately from manuscript notes. I shall therefore premise generally, what may shew the contrary of this suggestion, and leave the report of that case to his Lordship.

iii. Where the same *corpus* is given by both codicil and will, as the ruby ring. *Cujacius* says, *Aliud est juris in quantitate, si eadem res in eodem testamento legatur, bis solvi non potest; rem consequetur vel aestimationem. Legatarius probet, & rem & aestimationem solvendam.*

It was supposed in argument, that Lord *Hardwicke* declared, that in the case of the slaves it made no difference; that both were for the same cause, and the less sum only shall be paid: But his Lordship cites cases to the contrary. In the *Dig.* it appears, if it was left 100l. and afterwards 50l. in the same will, both should be paid.

Si quantitas bis legatur, bis solvetur, nisi probatur secundam adimendi voluntatem fuisse.

It struck me as very odd, that when a man in the same instrument gives twice, it should be forgetfulness; and yet this to be at the distance of seven lines: Notwithstanding that, in different instruments, at the distance of a year or more,

more, such a multitude of writers as I shall show agree that both sums shall be paid.

With respect to the ten *aurei*, and afterwards seven; *de specialiter in testamento generaliter in codillis*.

Minochius's rule, too, may be adopted, of both being for the same cause.

The Chancellor *Langissean* has decided upon a similar case.

[130] There is another rule—*Si major quantitas in codicillis legata fuerit, majori minor inesse videtur; nisi legatus aliter probaverit*: But this reasoning is drawn from the case of the slaves only. That this rule was applied by Lord *Hardwicke* beyond the special case, I believe you will hardly find, unless he was inconsistent with himself, which is not easily believed: He recognizes the authority of *Swinburne*, but here is a difference, "*nam inesse videtur*," he considers the two duplicate codicils, with hardly the least variation. With regard to the *Roman* law, where two equal sums are given by two different writings, there is a great weight of authorities that both shall be paid. *Dig. l. 22. tit. 3. Gothefrid*, That where the same sum, it is a double legacy; *in eodem testamento si idem corpus bis legatur non nisi evidentissimis testimoniis, bis solvendum; sed in diversis scripturis*. In different writings, it seems then, the presumption is in favour of the devisee. And this looks so strong, as to imply an idea, that where there was a specific legacy twice given, (the strongest, one should think, of all possible cases,) of a double legacy as against the devisee, the devisee should have *& rem & estimationem*; unless it could be proved by circumstances, or evidence of witnesses, too easily received in that law, that the testator meant otherwise. But in case of a specific legacy, Q. Whether this idea can generally prevail; and whether Lord *Hardwicke* has not shewn it to be disallowed in the case of *The Duke of St. Alban's v. Beauclerk*? *Godolphin*, in his *Orphan's Legacy*, last chapter in the book, laid down certain positions for the better understanding legacies.

Minochius De Probationibus

Swinburne, part 7. c. 21. tit. 13.

Ricard, a book of authority.

Lord *Hardwicke* affirms the doctrine in *Swinburne*, by distinguishing the case from it.

Upon the two cases in this court, *Wallop v. Huit*, *Newport v. Kynaston*, in the same book, the same rule laid down; 500l. and then 500l. in silver.

In a less sum, *Swinburne*, and *Godolphin* are clear both shall be taken.

Godolphin. If a testator in a will gives 10l. and 50l. in a codicil; and says his executor shall only give 50l. this is a redemption; therefore, had he not revoked, had it existed naked, both should be paid.

Can a man know, in a great estate, precisely what he gives? He gives so much at all events, and more if he comes to more.

If the first be a less, and afterwards a greater sum, (*Ricard, p. 4. Testamentary Donations*.) what shall we say, if by the same act the testator has first disposed of a less sum, and afterwards a greater? My opinion is, they shall not be blended; it lies in the heir to prove that the intent was not to give both, for the words of the will shall have the presumption in their favour: It is idle to suppose the testator did not know what he had given before.

Wyndham v. Wyndham.

Pitt v. Pigeon.

Masters v. Masters.

I shall only add, That in this case, if we take the 1000l. as redemption of the 500l. it is the same as if the 500l. only had been given in the codicil.

I think, in this case, *Lydia Hooley* is entitled as well to the 500l. in the will, as the 1000l. in the codicil.

Lord Chief Baron *Smith*. After stating the case, his Lordship proceeded nearly to this effect:

On consideration, I am clearly of opinion with my brother *Aston*. It seems agreed on all hands, that the intent, when it can be found out, is the best rule. Lord *Hardwick* seems to have determined on this ground, in the case of *St. Alban's*.

On the part of the plaintiff, intention in favour of the legatee was argued; on the part of the executors, a perfect neutrality. Taking it as neutral, let us see the rule of law.

If in the same instrument, If equal sums, the legatee must prove them due.

If in different instruments, if different sums, then the executors must prove both not meant to be paid. *Swinb. 125—6, 530. Case of Ruffel*.

St. Alban's case was determined on the particular grounds; nobody can doubt, I think, that the last codicil was taken as merely instead of the first. In that case too, the codicil was not a different instrument; for her Grace, by the particular

ticular words, had drawn the codicil into the body of the will.

Lord Chancellor—I can't help considering myself very highly obliged to Mr. Justice *Aston* and Baron *Smith*, for their great pains on this occasion.

It would be unnecessary for me to say any more, than that I am of the same opinion. But Mr. Justice *Aston* having put me to state some cases, of which I am so fortunate to possess better notes than are in print, I shall principally confine myself to them.

[132] When this came before me by appeal, the case by Lord *Hardwicke* was so urged on me, that I could not help doubting my own opinion in favour of the master. I therefore called in some of the most able judges of *Westminster-Hall*, who have consulted more than one or two civilians.

Indeed, this being a matter of ecclesiastical nature, we must determine, as in every case where there is a concurrent jurisdiction, by the laws which direct them: That is, we must see, what the civil law says. We are all agreed, there is nothing of weight in the writing to prevent the matter from standing indifferent; therefore, our rules of intention can have no effect; and we must see the rules of law.

Lord *Hardwicke* says, the case divides itself into several parts.

Then he says, I am of opinion that in this case, upon the reason of the thing, the being in a different instrument makes no difference, because she has directed them to be taken as one; and as the will and codicil make but one will, and the rule from the text of the civil law, even more certainly than the commentators, seems that both should not [if in the same will] be paid, therefore, his Lordship was of opinion there that both should not.

He does not say that the heir is bound to prove the will; but that if he proves the second sum, *inanem esse*, that is sufficient.

There are words in my manuscript, that the power reserved by the testatrix made the will and codicil but one instrument, *inesse videtur*.*

Lord *Hardwicke* considered the last codicil as merely substituted for the first, as far as they concur, and took them into the body of the will.

In *Swinburne*, says his Lordship, it is true, in some of the instances it is so, but not in this case, (that is, in *Swinburne*, the

* Verba relata ad id maxime, operantur ut inesse videatur.

the codicil and will being taken as different instruments, distinct legacies to the same person might pass by each; but here not, the testatrix having declared the will and codicils but one instrument.)

Lord *Hardwicke* supposes Sir *Joseph Jekyll*, in the case of *Masters v. Masters*, to have said, that both were given in the same instrument; and then says, very justly, the current of testimonies was to the contrary.

He says, the codicil was proved as part of the will; and [133] the second pecuniary legacy should not be taken, unless it was proved it would be so if in the same instrument. The second reason, as taken by Lord *Hardwicke*, was, I take, that reason on which Sir *Joseph Jekyll* meant to rest the addition of fortune as a proof of intention.

Wheeler and *Huit* stated—200l. given to two by will; and afterwards 200l. to two by codicil: Whether the double was intended, or no, they knew not. Lord *Shaftebury*, assisted by three judges, (there was no evidence entered into of intention) decreed 400l. a-piece to be paid.

Wyndham and *Wyndham*. The testator published his will in ———, and in ———: He gave 1500l. to each of his children; and 1000l. to his children henceforth to be born. By his second will he gave 4000l. to his little infant, *John*, who was born a few weeks before.

Question—Whether he should have 4000l. or 5000l.?

It was contended, the words *henceforth to be born*, had been interlined after the birth of *John*: No sufficient evidence of this, and parol evidence to the contrary. It was said, that if he had meant to give 4000l. he might have said, in satisfaction of all portions. This will was said, as to the last part, that it operated as a declaration of trust: But this was in the 27th of C. 2. and the declaration of trusts came in by the 29th. The next case, determined by Lord *Nottingham*, depended on the estate not being sufficient for the charities, &c. if twice the sum was to be paid.

Newport and *Kynaston*. A will speaks at the same time; a codicil implies an alteration.

Pitt and *Pigeon*. “I give to such child as shall be living at my decease 300l.” Afterwards he had three children; and by codicil gives 200l. Whether should be good, and to whom? Whether to the eldest, or to all three? It was determined, that the will extended to all, and that the codicil made no alteration in the will. That whether a less sum or a greater was given in the will than in the codicil, both were

were to be paid; unless the estate was insufficient, or there was the most evident proof of the contrary intention.

I consulted a very great civil lawyer, whether there was any decision there in this matter. His Lordship furnished me with one case, grounded on the *Roman* law, where equal sums were given.

[134] I have the satisfaction of thinking, so far from contradicting my Lord *Hardwicke*, we concur with his opinion. In the particular case he decided, he grounded his opinion on the will and codicil having been but one instrument by the power reserved. That is the strongest internal evidence; the bequest cannot be doubted there, either in the nature of the thing, or the intent of the testatrix. But the general rule of the civil law, his Lordship uniformly recognized: such, I think, as we have taken in the case before us.

Decree—That the 500l. in the will, and also the 1000l. in the codicil, be paid to the legatee.

Jewson against Read.

ON a motion to set aside a judgment for irregularity

Mrs. *Jewson*, a milliner of the city of *London*, and exercising her trade as *feme sole*, claiming this privilege as by the custom of *London*, borrows money of Mr. *Read*, an apothecary, to carry on her trade, to the amount of 9000l. and enters into a warrant of attorney to confess a judgment; upon which judgment is entered.

The assignees applied, upon the oath of Mrs. *Jewson* that her husband was not privy to the proceedings, to set aside the judgment.

It was argued against the rule, to the effect as follows:

I should submit to the court, Mrs. *Jewson*'s assigns are her representatives, and entitled to no more than she herself: If she come to avoid her own act, she shall not do it; and therefore the assignees shall not for her.

She has not insinuated the least degree of fraud.

The execution and judgment was objected to, because the declaration was as against a *feme sole* by the custom of *London*, whereas she was a *feme covert*, and supposed a joint trader with her husband. An absurd principle to depend on, this! It was contended; namely, that as a *feme covert* she could sign a warrant of attorney, and confess judgment, it was thought she might as well plead and be impleaded alone: But if otherwise, the method of objection would have

have been by demurrer to the judgment. If the warrant be set aside, we can't come in as legal creditors, we can do nothing to recover our debt. The gentlemen on the other side may, either in equity, or by bringing an action. Now it appears by the affidavits, the money was lent her as a *feme sole*, trading by the custom of *London*.

[135]

On the same side, it was argued in the declaration, she is sued as a *feme covert*, being a sole trader by the custom of *London*. If it had been true, and she, being a *feme covert*, had been impleaded as a *feme sole*, the remedy ought to be by writ of error. It is of too great consequence to *Mrs. Jewson*, who will be able to obtain no security, nor recover any thing, if on motion only the judgment be set aside—of too great consequence to the city of *London*.

The court of Chancery has had a similar case before them, upon petition; which they thought much too great for them to determine in that manner. They have therefore ordered an action to be brought on it, which will be tried before your Lordship in the next sitting.

Mr. *Wallace*—I take the signing a warrant of attorney in this case, to be at least a warrant conditional. I think, even in respect of fraud as we are told, *Read* cannot come in with the creditors, if this judgment be set aside. It's my opinion, it's not a fraud as between them; but as to the other creditors, it may perhaps seem otherwise.

Your Lordship has held, an action upon the custom of *London* must be before the courts of the city of *London*. This court cannot take notice of the custom as the ground of action; though in defence they must. In a defence it's a part of the custom. Then it stands, the custom being laid out of the question, Whether a bond by a *feme covert* is good at the common law? Is this too great a question for this court to determine on? I take it, therefore, on a confessed judgment we are in the common course: And your Lordship will see there are no grounds.

[Court observed, in case of a *feme sole* entering into a bond, and afterwards marrying, they entered judgment against her as a *feme sole*, whereupon the court set aside the judgment.]

As to the custom, there was a question, Whether upon the custom of *London*, a woman's real estate can be affected?

It was held not.

Can a woman who has an husband give warrant of attorney not to defend herself in an adverse judgment, without

out

out the concurrence of her husband; and in this court, where her creditors cannot sue her on the custom?

[136] It was properly observed, that the husband must join in error. Can the creditors oblige the husband to join? Might not this be thought a sufficient reason? Was it ever heard there was a case of a married woman giving a bond, with a warrant of attorney to confess judgment, in the case of money which she might or might not apply to her trade; and which, in the instant of receiving it, she might give away, or do what she would with it?

But the man will not lose his distribution as creditor. If he does not come in as legal creditor, will he not as equitable creditor? Surely.

With regard to the custom of *London*, and impleading in the city, I read with attention your Lordship's decision in *Lavie and Cox*; and the court saith it not, I think. The court saith, A *feme covert* exercising a trade wherein her husband meddleth not, she may be impleaded sole.

Lord *Mansfield*—In the case I alluded to, there was irregularity in her. It was a *bonâ fide* action, on expectation of a near bankruptcy; no fraud. If the husband has not demanded his remedy by writ of error, he is the person entitled to that remedy; and no one else can impeach the judgment.* If the assignees have a right, they will have the benefit of an action. As at present advised, I think the custom cannot be proved in this way before the court; nor we take notice of it as the ground of the action. I am of opinion, the assignees must use their action; an action, if they please, of trover. If it's good by law against the assignees, there is no ground for the court to proceed (as in equity) in a summary way. They have advantage of the judgment and of conscience. If this is fraud, the assignees certainly will take their advantage: And I see no other cause why the advantage should be taken from the creditor.

If the *feme* had gone from her husband, and he complained, we then *audita querelâ* might have given relief in a summary way. And if motion had been on the part of the husband, we might have done the same: But nothing has been said on the part of the husband.

Let it stand over for a few days, that we may see what the husband says.

Afterwards, it was argued before the court by Mr. Cow-
[137] per, on four questions.

1st, Whether by the custom the obligation was good, without her husband, on action here?

2dly,

* Quilibet potest renunciare juri pro se introducto.

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2dly, Whether the judgment valid?

3dly, Whether the warrant to confess judgment by attorney good?

4thly, Whether the custom can be tried here?

There is a difference between acts done by a *feme covert* and an infant: The one is incapable for want of natural judgment; an infant can do nothing but what he is bound to do for the benefit of others, or clearly or indisputably for its own benefit. A *feme covert* is only incapable for want of liberty, being *sub potestate viri*; but where the custom expressly enables her to act, in matters concerning her trade, independent of her husband, she is exempted from that incapacity, and is under no other. If she may manage her trade, she may surely borrow money.

The validity of the obligation, I think, may be evidently evinced. The husband is not necessary to be joined in the action.

The consideration of the bond was very expressly for the use of her trade—it was so recited.

Whether the appearance by attorney was good, I think, can scarce be questioned. If she may plead and be impleaded, she may undoubtedly appoint an attorney. Whether the confession of judgment is good, I must confess I can't find precedents. I was informed, on directing application to the city court, that when a *feme sole* trader by the custom of *London* confesses judgment, it is always entered in the court above.

4th, Whether an action on the custom of *London* maintainable here?

It is admitted the court will allow them, when properly brought in, that they are good matters of defence. If the *feme covert* can contract a debt, that debt follows the person every where.

Vide Jemino and Burrows.

The customs of *London* are not the only customs which have been proceeded on here in actions; yet certainly they are of the metropolis, are therefore of importance, and affect great numbers; have been recognized in books ever since R. 2. and have been taken notice of in equity and common law.

Wilford, chamberlain of *London*, Cro. Eliz. 682. Debt [138] on a recognizance acknowledged to the plaintiff in *London*, according to the custom there, for orphanage-money. Custom alledged. All the court were resolved, it was a good recognizance; and on error in the Exchequer-chamber, judgment was affirmed. Vide 4. Co. 64, 65.

Bird and Wilford 464. Upon error on a judgment in debt in the Common Pleas. Error assigned; debt upon an obligation, as successor to the late chamberlain, and that obligation to a sole corporation shall not go to his successor. *E. 4. c. 20.* cited; and argued, that as a chattel, it shall not go to a successor. And the court were of opinion, the obligation was good. And *Dyer* 48. cited; and that it is lawful and reasonable, the custom being averred to be so: Wherefore judgment was affirmed.

When a custom is not contrary to the common law, it's a part of it, and therefore determinable here.

In the case cited, the recognizance would have been had, but the court (if I may so say) legitimate the custom on a bye-law.

Keskot and Brady, an action of debt in the county of Chester, which came before your Lordship; and there your Lordship took notice of the bye-law.

Lord *Mansfield*—It has been extremely well argued: I would only desire, Mr. *Cowper*, that you would argue on the objection of the necessity of the husband's being made a party here. Undoubtedly, when a right is established by the law of *France*, and the party comes here, the debt must be recovered here, according to the law of *France*; of which the court will take notice on information upon evidence, and decide thereon. But the question will be, Whether by the common law, the appearance of the husband joined in the action be not necessary, when they come to enter judgment in this court?

Vide *Jemino and Burrows*.

It is impossible for us to determine the question this term. I see a great field of argument open. It must stand over for next term.

Mr. *Wallace* said, The averment of the money being for her trade, was contrary to Mr. *Jewson's* oath.

Mr. *Cowper*—I am sure Mr. *Read* swears every sixpence was lent for the trade. It is true, Mrs. *Jewson* employed them on her entering into acceptance of bills of exchange. But on the affidavit it appears, this acceptance was within three years, and this bond was three years ago full.

[139] Mr. *Wallace*—By the custom, she should be imprisoned: For the attachment is not upon her goods, but person; and the law would not receive this custom of separating a wife from her husband.

Lord *Mansfield*—If that had been the case, we could not have granted execution on the commission.

Mr.

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Mr. Justice *Dennison's* opinion, in the case of *Ballard and Bennet*, that there is a distinction between the city of *London* and all other corporations, on account of the modes of recovery, is material.

Case cited which Mr. *Cowper* had cited, 1 E. 4. *Michaelmas* term, in which a distinction is taken of customs whereon the particular remedy must be had in a particular court.

1 Lev. 131. Only a *dictum* of counsel: Answered, that it was a *dictum* by counsel and judges, that a *feme covert* may be sued here without her husband.

Sid. 178. Negative bye-laws cannot exclude the jurisdiction of the courts of *Westminster*.

Action on the custom of *London* for calling a woman wh—: The court took notice of this custom.

Mr. *Buller* took the difference to be between common law and local customs: That the judges are bound to take notice of the common law, without particular citing; but customs must be particularly cited. On the reason of the case, a *feme covert* is *quasi sole*, trading by the custom of *London*. A *feme sole* can undoubtedly have her action here: A *feme* trader by custom is not *quasi feme sole*, if she cannot sue here. Besides, nobody can be tried in the city courts, who does not live within the jurisdiction: Therefore, if any body out of the jurisdiction be indebted to her on account of her trade, she cannot recover.

On the question, Whether she can give security without her husband? Mr. *Buller* argued, this was necessarily incidental to her trade, with reference to the maxim.*

On the question, Whether the husband should be sued? the words of the custom were cited; which provide, that if the husband be sued, he shall not be liable. This was alleged to be conditional; not compelling him to be sued with her, but providing for her indemnity if he is; and *cui bono*, [140] that he be sued, when he cannot be liable.

Lord *Mansfield*—It is a hard case against *Read*, who appears *bonâ fide* to have lent the money, and with the privity of the husband, as it seems. But the great difficulty is, how the woman alone, being a *feme covert*, can be sued in the courts of common law, as single.

The course of the law here gives the husband an opportunity of being heard: And when a local action comes here, it must follow the rules of our law. Therefore it

N

seems

* Quoties aliquid cui conceditur, conceditur & id per quod pervenitur ad illud.

seems to want strong support of precedent. Notes were not in use, nor thought of here, when the custom took rise.

The husband being asked, whether he was privy to the transaction of *Read's* lending the money, said positively he was not, nor should he have approved it, nor was he privy to the execution.

Lord *Mansfield*—This considerably justifies his opposition.

This case stood over, on the necessity of the husband's joining in affidavit.

Mr. *Buller* opened, on a point which the court thought very material: Whether the husband was privy to the matter?

Mr. *Buller* observed, the suspicious behaviour of Mr. *Jewson*, on his examination last term; his hesitation, perplexity, and instruction from one of the assignees, that he entered the money advanced to Mrs. *Jewson*, not as the rest, in the name of *Jewson*, but *Read*; that he had applied part to his own use, in building a house; that he left them apart always, to conceal his knowledge; that he had declared, Mr. *Read*, he hoped, would never be deprived of his remedy: Many other circumstances inducing strong suspicion of fraud.

Then to the point of joining the husband in the judgment. If the husband were to plead, he must not be made liable by the custom; if he should be joined, he should not be charged or impeached. To what use, then, to join him? It would be to destroy, not maintain the custom. Besides, the husband, by pleading falsely, might ruin the wife, and bring her to perpetual imprisonment. That the rule, that an action where a remedy is given, must be carried on according to the rules of the court where the action is brought, will not be an objection. Here is an action of debt, which is according to the rules of the court, as far as the custom will permit. If there is to be no distinction, then a custom is abolished, which is *res ex causa rationabili usitata quæ privat communem legem*. If the husband be joined, it must be for his or his wife's benefit; or thirdly, for conformity: For his it cannot be, for he is no way liable to any inconvenience, except his being deprived of the comfort of his wife, should she be imprisoned; but he knew this inconvenience, and took his chance of it, and therefore shall not be permitted to plead exemption from that. If her trade is fortunate, he can at any time put an end to the trade; if unfortunate, by parity of reason,

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reason, he must submit to this single inconvenient rule, to which he might have known himself liable. For the *feme's* benefit it cannot be. We have shewn before it may be to her great damage. If it should be thought for conformity's sake, where an equitable relief is desired, and in a summary way, your Lordship will not think the want of conformity sufficient ground to prevent the action here.

Mr. Wallace—By the common law, a warrant of attorney by a *feme covert*, without her husband, is undoubtedly void. If they would maintain their custom, they must have come to their relief regularly, and sued for remedy regularly.

By the words of the custom, where a *feme covert* useth any craft of her own money, whereof the husband meddeth not, she shall be as a *feme sole*, with respect to that corporation; may sue and be sued alone: If she be condemned, she shall be imprisoned. The custom of an execution on her goods (if it be a custom) must be immemorial before the statute of H. 3. Your Lordship could not have granted *capias ad satisfaciendum*: The statute gave it then on action of account against bailiffs or receivers; that of E. 2. gave it in debt, detinue, and many other particulars. It is said, indeed, on the entry of the judgment, that it was on money, touching her credit: It is said, but what proof of it's truth?

32 H. 3.
commonly
called the
statute of
Marl-
bridge, c.
23.

2. Keble 273. On a question, Whether a *feme* by the custom can sell ale? The court said, whether this could be by the custom, they would not take notice—it may be tried in the city courts: The husband must join here. A *proceeds* was granted in that case.

In the case of *Lavie and Cox*, your Lordship and Mr. Justice Yates were of opinion, on giving judgment, that the custom might be pleaded in defence of the courts here; but not otherwise. A simple-contract creditor, by the book, is in some cases considered as a specialty-creditor. Being sued here, he pleaded the custom; it was necessary to be admitted, otherwise he was twice liable. No instance of a *feme covert* giving a bond; of course, none of a warrant to confess a judgment. Cases have been cited, where a *feme sole* may be sued without her husband.

Cases of banishment or transportation, and many others of the same sort, come not the least nigh the point. Banishment is a civil death; transportation is a temporary death. Mr. Justice Yates, on the circuit, in a question, Whether *feme sole*, whose husband had been transported for seven years,

years, and was then abroad pursuant to his sentence, might plead without him?

Mr. Justice *Kates* took time to consider, and afterwards determined, that from necessity the *feme* must be admitted to plead.

Lord *Mansfield*—I ventured to determine the same concerning it, as analogous to abjuration of the realm.

In the case of the chamberlain of *London*, the chamberlain was considered as a sole corporation. But, say the gentlemen, the husband has no concern. No, certainly: The wife is to be imprisoned—What does a divorce matter? In some instances it is of no account; in others, I believe it may. Mr. *Wallace* said more, very ably to the point. And was followed by Mr. *Davenport*, nearly to this effect:

Mr. *Davenport*—I don't see by the custom the *feme* is entitled to borrow. She may buy and sell as a sole trader by the custom: I do not see any thing further necessarily implied by the custom. It will be taken strictly, I conceive, not only by the general rule, but from its particular nature; which is to favour one creditor, to the prejudice of the rest.

Nor does the custom intitle the wife, either by words or implication. In a suit here the custom legally attaches to place, not to person, and is thus distinguished from prescription. This is a particular custom, confined to the city of *London*, existing there only: For from the case of the chamberlain of *London*, the custom being alledged in the city court, the action and whole process follow of course. But in this case, from the beginning of the action to the final judgment, the action is regulated by the custom; not a step can be taken without: And it cannot be taken notice of, except in the courts whence the custom originated. A determination was cited referred to *Brooke*, title *Custom*, from the Year-book, distinguishing between *Gavelkind*, *Borough-English*, and such customs, of which the courts throughout the kingdom would take notice, the common law proceeding regularly on the custom assigned; and customs where not the right only but particular remedy was given by the custom, out of or contrary to the mode of proceeding by common law.

[143] Mr. *Cawper*—I endeavoured before to prove the lending money and executing a bond, was incidental, from the nature of the custom; for if they give her the right, they give her the means. Therefore, farther, she might not only borrow, but give a bond, and of course confess judgment.

Mr. *Wallace* observes, as decisive, the statute of *Mart-bridge*. But certainly, if the custom did not give remedy, by execution on the goods before, when an act of parliament came, and gave a remedy applicable to the case, the court having the matter before them, it was competent to apply the remedy accordingly. For the question concerning the custom of a *feme sole* giving a bond, we are looking for a needle in a bundle of hay. There has not been one found, there may be many. We applied to the court of the city, the answer was remarkable—"That the judgment had always been entered in this court." It has been said, the consideration does not appear. I presume to say, being known on record, it must be taken to be true.*

As to locality, I admit customs are such, as to the right they give. But when the law has recognized the custom, it will certainly give the remedy. She is a debtor on this as well as on the other side of *Temple-Bar*.

[An attorney of the city courts was called upon by the court, to say, whether he knew of a *feme sole* bringing an action in those courts, on the custom. He said he had known many cases in which the wife had been sued without her husband.]

Mr. *Couper* continued to say, That if the court should doubt, whether the millinary trade was within the custom, they would direct the recorder to certify. If on the matter of law, he said, they shall be disposed to contend with us, they may bring their writ of error. It may be said, we pleaded a release of error. I hope the plea was good: It was obtained *bond fide*. But the court will be, after all, to judge of the validity of the plea. We, if precluded from this, have no remedy.

Lord *Mansfield*—This is an application to the court to set aside a judgment, as entered up without authority.

Allowing what we will of the extent of the authority of a *feme covert*, trading as a *feme sole* by the custom of *London*, she enters into a bond, without mention of herself as a sole trader, or of the consideration of the debt. Then she grants a warrant of attorney, without any mention of herself as a sole trader. The attorney has a long declaration of the consideration of the debt; of Mrs. *Jewson's* being a sole trader, &c. Had the attorney any right to enter judgment on this collateral circumstance? Does not this make it without authority? If there were any thing litig-
able,

able, it appearing a *bonâ fide* debt, and without fr
against the husband, we would wish, in so large a f
to give the creditor a chance.

The husband, by the case in *Croke*, joins in a firm
contract action; and he has a great interest, that he
not be deprived of her society.

Does the custom empower her to enter into a bond
bind her heirs? Suppose she had a great real estate, c
the custom empower her to make executors? Here
trader as a *feme sole*, dealing on paper-currency to 70,0
The notion of this would have startled the city at
time of making the custom: But this refers to the ot
security. Upon the bond for this 9000l. does it not cha
the nature of the debt? A bond given by a *feme co*
is void by law; has the custom said any thing to supp
it? Certainly not. Is there a single case, where a *f*
sole trader has given a bond? Is there one where she
answered an action without her husband? The cust
declares she shall join, only providing for the security
the husband. If she cannot by the common law, nor,
appears, by the custom, be sued herself without her b
band, can she make an attorney? *

The custom seems to say nothing of the execution
the goods. The reason may be, that they live under
same roof; their goods are therefore mixed. Theref
there was a fault in entering judgment on execution,
that ground be good.

On the whole matter, the court was unanimous, T
the goods unfold be restored; and the value of those so
in the hands of the sheriff, be restored; and that the h
band appear in court, and his concurrence be mentioned
the rule. JUDGMENT WITHOUT COSTS.

Bail.

Good debts
may be con-
sidered as
part of ef-
fects of bail,
and yet they
are a chose
in action.

BAIL was asked, what he was worth; and said, 100
Being then asked, where it was; he said, in t
hands of his customers. Allowed sufficient, if the deb
were good debts.

* *Nemo potest plus potestatis in alium transferre quam in se habeat.*

OBJECTION

OBJECTION to bail, that one of them was a lieutenant of a marching regiment, which, by affidavit, the deponent says, he is informed and verily believes in *America*, and therefore the lieutenant likely to be compelled to join it immediately. This objection on information and belief not admitted.

Information and belief good on an affidavit against bail, when the matter in its nature is matter of information and belief.

[*145]

BAIL said, he had an estate of 50l. *per annum* in *Yorkshire*: They said, it was become a fashion to swear to estates in distant counties.

If a man offering himself as a bail, will swear he has effects in such a place,

Lord *Mansfield*—Then if he swears falsely, you must indict him.

he is not to be rejected; but you may indict him for perjury.

Entry of Judgment.

WHEN judgment is entered at a time when by the rules and practice of the court it may be entered without irregularity, the party shall not be admitted to say it was sooner entered than it should have been; and, under that pretence, entitle himself to begin again without costs, by calling it a *snapping judgment*.

A regular judgment not to be called a snapping judgment.

Lord *Mansfield* said, he did not understand the application of that expression, as *applied to a regular judgment*. That they might, before the expiration of the time for signing judgment, have moved for an enlargement.

Sheriff.

WHERE a sheriff comes to levy execution, and the party against whom the writ went declares a *fiat* *fiat* assignment for debt, and thereon possession of a stranger, the sheriff may impanel a jury to try the possession.

Maxim.

THE maxim, *Qui peccat in syllaba peccabit in tota causa*, was taken notice of from the bench as reprobated, in many instances, by many acts of parliament. *Vide* 52 H. 3. c. 11. 14 E. 3. f. 1. c. 6. 9 H. 5. f. 1. c. 4. 4 H. 6. c. 3. 8 H. 6. c. 12. f. 2. & c. 15. 5 G. 1. c. 13. 8 H. 6. c. 12. f. 2. 8 H. 6. c. 15. 6 G. 1. c. 21. f. 10. 5 G.

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6. 19. of amendments. Of *jeofails*: 36 E. 2. f. 1. c. 15.
 8 H. 6. c. 12. f. 1. 32 H. 8. c. 30. f. 1. Of mispleadings
 aided by verdict, *vide* 18 Eliz. c. 14. 21 J. 1. c. 13. Of
 want of form; not to arrest judgment after demurrer, *vide*
 27 Eliz. c. 5. 4 An. c. 16. f. 1. With an exception, how-
 ever, of certain criminal cases, *vide* 18 Eliz. c. 14. f. 2.
 [146] 27 Eliz. c. 5. f. 3. 21 J. 1. c. 13. f. 3. 16 & 17 C. 2.
 c. 8. f. 4 An. c. 16. f. 7. 5 G. 1. c. 13. f. 2. Of defects
 in form amendable, see farther, 27 Eliz. c. 5. f. 2. Of
 judgments by confession, 4 An. c. 16. f. 2. Of revenue of
 the crown, 4 An. c. 16. f. 24. Mandamus and informa-
 tion, 9 An. c. 20. f. 7. Proceedings in *English*, 4 G. 2. c.
 26. f. 4. Of judgment after verdict, *vide* 16 & 17 C. 2.
 c. 8. *Vide Ruffhead's Index* to the 9th vol. but above all
 in direct application, *vide stat. de Wallia*, 12 E. 1. *Ruff-*
head's Appendix, p. 9. *Cum vero deforcians comparuerit,*
quia per verba brevis non potest sciri petitio petentis eo quod multe
et quasi infinite sunt rationes petende necesse habet ille qui petit
quod narret versus deforcientem, et exprimat rationem petitionis
sue, et hoc per verba veritatem continentia sine calumpnia
verborum, et non observatâ illâ durâ consuetudine, " Qui
cadit a syllabâ cadit a totâ causâ."

Misprision of words.

WHERE the jury find a greater sum than that laid
 in the declaration, *il semble* the verdict cannot be
 amended by making the sum equal to that in the declara-
 tion; and the case of *Wray* and *Lisser* was cited. And it
 was said, a declaration in *debet* and *detinet* against an execu-
 tor could not be amended by striking out the *debet*, and
 retaining the *detinet* only.

Indictment.

INDICTMENT maintainable for fraudulently obtain-
 ing goods, under pretence of a treaty of marriage.

Warranty of Goods.

IF a seller warrants an horse sound, he does it at his
 peril if the horse was not found at the time of sale;
 whether he knew it or not.

The court, in a case of this sort, did not choose to grant
 a new trial; though the judge who had presided at the
 trial

trial expressed himself rather inclined to the side of the plaintiff, and the jury had found for the defendant.

Lord *Mansfield* said, the courts were usually enough troubled at the first trial in such matters: That it was neither clear enough, nor important enough, to answer a second trial.

The counsel on the side of the plaintiff desired a new trial; on suggestion, that the person who summoned the jury was a bailiff and alehouse-keeper, and for that reason might well have influence over the persons he summoned, on both these accounts: * That the horse was admitted to shew for twenty, and yet was bought by the defendant for twelve; and that this was a strong presumption of his unsoundness: That the plaintiff was no jockey, and the defendant was. That the plaintiff had suppressed evidence of unsoundness, which in fairness he should not. [147]

Lord *Mansfield*—It does not follow in every case, where the weight of evidence may seem rather against the verdict, that a new trial should be ordered. There is no nice point of property.

Not every cause where the evidence seems to preponderate against the verdict, is a cause for a new trial.

The plaintiff asks, that he may be at the expence of 20l. at least, for the chance of twenty, which is the whole value of the horse. *Uncertain justice by a verdict is much better than certain injustice*: Which latter, I think, would follow, by granting a new trial where there is contradictory evidence besides. ‡

Uncertain justice better than certain injustice.

Agreement to abide the Event.

WHERE there is an agreement of many causes to abide the fate of one, for the expedition of justice and the great benefit of the parties, it is to be, on a determination of that one to the full satisfaction of the court.

Where causes are consolidated, the verdict which should bind

the rest ought to be fully satisfactory to the court.

Bail.

PROPERTY abroad, where the ordinary writs of the crown go not, signifies nothing, though to any amount. §

King

* Quod fieri non debuit, factum valet.

† Lex vult potius privatum incommodum quam publicum malum.

‡ Frustra quid alicui conceditur nisi concedi possit & id per quod pervenitur ad illud. Lex nil facit supervacue.

King against Jackson.

The court will not punish in an extraordinary way, where the act complained of was occasioned by fault of the complainant, and he is obliged to do that justice he ought to have done himself, if the matter does not appear malo animo, but will leave him to his ordinary remedy.

THE court refused to grant an information against *Jackson*, a justice of the peace, for forcing one *Rawlinson* to marry a woman whom he does not deny to have got with child; but says * he was not willing to marry, she having had two bastard children before her marriage, neither of which belonged to or were fathered on him. The force the justice used was threatening to commit if he did not marry her. But the court discharged the rule; observing. *"That though the justice might be thought to have spoken hastily, yet either to marry the woman he had got with child, which he ought to do after the injury, or to indemnify the parish, was what by law they were entitled to require of him: On refusal of one or other of which they certainly would commit him."*

[*148] Rule discharged, without costs.

Bail.

The value of the house not material in bail.

IT was said, a man must rent a house of 10l. *per annum*, to be taken as bail. Mr. Justice *Aston* said, the rent was immaterial in this case; for his being an house-keeper was only required, that they might know where to find him; his other effects were to answer, and if he had sufficient of them it would do.

Mandamus.

APPPLICATION for a mandamus to admit a burgess; on the other side, they offered to admit without a mandamus.

The court would not immediately grant a mandamus, till it should appear by their refusal that a mandamus was necessary.

The King against Dennison.

ON a motion for an information, grounded against the defendant for a letter, accusing a noble Lord *inter christianos innominandi flagitii, & quod non proficit scire.*

The

The letter was full of indignation; expresses great complaint of injury; great and ungrateful injury, done to his character; threatens, if driven, to bring matters to light which would make this climate very disagreeable to his Lordship: That from attachment to the family he does it with reluctance, and from obligations to his Lordship. How must his Lordship blush, he asks him; and how must the world; if he should divulge, his lordship solacing himself with his menial servants: If those detestable practices should be disclosed, what would be the consequence?

He requires an indemnification for all his expences, and a good title in law to be made for an house; which, he says, his Lordship had promised to let him for twenty-one [149] years, and requires farther an indemnification for the injury done to his character.

It appeared that the defendant had been confessor to the informant; and that about two years ago he had renounced and became a protestant.

It was stated, that afterwards he went and lived on a curacy of 50*l. per annum*, in *Essex*, at a distance from his Lordship; and was traduced, as he suggests, by his Lordship; of theft, perfidy, and getting a bastard child: That then he wrote the letter; and it was alledged, as against the information, that the crime, whatever it might be, the informant does not justify by declaring his innocence. That the defendant not as confessor, but as a domestic, was witness of indecent practices, which he does not think himself obliged particularly to disclose, but shall be able, if necessary, to prove them, by himself and many witnesses.

That where the party did not appear innocent, an information was not usually granted.

Bur. 548. It appeared, the parties applying were cheats, as well as those applied against. Application rejected. *Bur.* 553. The court said, the party not having sworn to his innocence, the application must be rejected.

Rex v. Peach and others.
Rex v. Athay.

Lord *Mansfield*—I am sorry to see these fruits of conversion; this man was a confessor to his Lordship. [Then his Lordship stated the crime charged as perpetrated, or at least attempted.] In this mode of application, even justification of the truth of the fact will not do. This man, if he had not been a convert, is still liable to be called a jesuit, from his manner of defence, saying, by means exclusive of confession; what does that imply? That his Lordship has been guilty of very indecent practices. Why does not he speak out!

Justification of the truth not good to an information
Vide 5 Rep. 125. De Libellis famos. sec. 4.
Hobart 252—3. Luke v. Hatton.

It

It is true, this is an application for an extraordinary remedy; and therefore the court will not grant it lightly: But they will do justice; and therefore they will not withhold it, if the nature of the case requires it.

As to the case of challenges; where it appeared the challenger brought an information against the party accusing, there the court would not grant. In the case of a man convicted for selling ale without licence, there, on legal conviction, the man not being able to say, he was not guilty, the court would not grant such a remedy for informality only.

[150] Besides, for argument sake, admitting the crime, here is a letter to extort money to compromise a felony.

As to the objection to his Lordship not answering, here is an accusation so general, that it hardly admits a direct answer; because there was no saying, especially if his Lordship be innocent, what was to be charged.

LET THE RULE BE MADE ABSOLUTE.

And I think there never was a more odious attempt to ground an information on.

Mr. Justice *Aston*, to the same effect nearly. He concluded, with observing, that the defendant, from a catholic confessor, seemed to have become a protestant extortioner.

Mr. Justice *Aston*—It seems very odd, if there should be a rule, that on application for an information, the party applying should declare his innocence against a general charge; when, on information granted, you cannot justify for the truth: That he was of the same opinion with his brethren for making the rule absolute. He concluded, with saying, the defendant was alike criminal, be the charge true or false. If true, why did he not proceed by indictment? Why is the whole affair to end by compromise? If false, what is it but a most shocking calumny to extort money?

Note. What seems remarkably particular in this head, is, the defendant in the close of his letter offers, that if his Lordship makes him the title to the house, and gives his character the indemnification desired; the truth shall never be known, his Lordship's character will be established; party disgust will gradually subside. And that he shall be glad to shew his Lordship, that no body has a more sincere, tender or grateful affection for his Lordship, nor more willing to do him every service, nor more reluctant to do him any hurt; which pro-

Hilary Term, 13 Geo. 3. K. B.

professions fall under the same dilemma with the circumstances noticed in the precedent observation.

Foreign Judgment.

YOU can't bring an action on a foreign judgment, as judgment, but you may bring an action of debt, and give the judgment in evidence.

Vide Barrow v. Jemino, 2 Strange 1733.

Attorney of the Court.

[151]

NOT to be held to bail in civil cases; for he is always *in curia*.

Hilary Term, 4th February 1773. Cur' Canc'.

AN injunction was moved on affidavit, suggesting that *A.* had not accounted to *B.* as he ought to have done, for the rents he had received, and the wood he had cut down. Injunction must be against present waste.

Lord Chancellor—There is not a word in your affidavit to supply your motion. *An injunction is to stay present waste.* You complain not that the party is cutting down wood, &c. but that he has not accounted for the rents he has received, nor the wood he has cut down.

Order of Nisi Prius.

ON motion to make an order of *nisi prius* a rule of court, it was moved, that the court would permit certain explanatory words to be inserted. But the court directed the words applied for should be made a separate rule.

Coote against Thackerary.

ON an action on *assumpsit* to recover a certain sum, on a quantity of hops sold to the defendant; it appeared the plaintiff had made a difference of 210l. to his advantage. The jury, however, found for the plaintiff; and a motion was made for a new trial, on the ground of excessive damages; and the rather, because several actions had been consolidated into one.

It appeared, that the plaintiff sold the same quantity which had cost him 6l. 18s. the same day for 7l. 10s. and that

that he had bought hops about the same time for 7l. 5s. with a view to raise the ideal value.

[152]

Lord *Mansfield*—The consolidating of several actions into one is certainly of very great public utility. Formerly, if there were ever so many actions on the same cause, the jury found separately on every one. You may, some of you, remember, that old *Craycroft* made a great stand against the introduction of this rule. When I proposed it, he could not give it up without his client's consent; the right of an *Englishman* to try an hundred actions, if he thought fit. He went at last to consult his client (it was the last day of term): We thought he would not bring back his client's consent; he came very late, and refused. On this, I directed the rule to be drawn up, with leave of *imparlance* in all the actions but one. *Craycroft* then desired he might have a discovery of letters, which he had been offered before; and then took the rule, for consolidating the actions in one, without writ of error or bill of equity. A day or two after, the defendant in the cause came to me, as I was sitting in *Guildhall*; said, he had the greatest obligation in the world; that he thought he been desired to give up something, he did not know what, to his hurt, as he then imagined; on the contrary, he had, without trouble, without expence, been at once admitted to recover 2500l.

Not every mistake of agents, counsel, or witnesses, is a ground for a new trial; but the real merits of the cause not being satisfied, is. Vide Bright v. Eynon, 393. Vide 4 Blackstone, c. 33. s. 5. 3 Blackstone, c. 24. p. 387, 392. 8vo. edit.

It is not to be denied, that not every mistake or omission of agents, counsel, or witnesses, is a ground for a new trial: But if the real merits of the cause appear clearly not to have been considered, there is then most clearly sufficient ground.

In this case, the counsel for the defendant examined a witness or two, and rested the affair, as they well might, as to that action, on the single, strong circumstance, of the plaintiff himself, on the same day, buying at 6l. 18s. selling at 7l. 10s. Had I been apprized, that so many other actions depended on the event of this, I should much have been desirous of entering into the whole evidence. It might have availed them; it might have had an opposite consequence: But the witnesses they had a right to produce. I remember, upon the trial, one of the parties, I forget whether witness or defendant, started up as if he had been shot, and said, in vehement expostulation to his counsel, when he heard the jury were going to find their verdict, "Sir, we have an hundred witnesses to produce!" "What did you mean!" Possibly, the witnesses who remained would have had some material effect as to the other actions, (where

(where the *argumentum ad hominem* was not equally conclusive) by settling more generally the price of commodity.

I could wish I were authorized to say, that the courts of law would afford no relief to either party, when engaged in these speculative contracts. But gaming, in all its sorts, is too big an evil for the regulation of positive law. Subject it to that, and the event is, you restrain it not at all; but the honest party suffers doubly; and the knave escapes and triumphs. The former loses, he pays; it is a debt of honour: The latter happens to lose, then the condition is changed: I would have taken, if I had won; but now, I'll pay you in law. *This is gaming very high indeed; tends to a monopoly; enhances the price of one of the necessaries of life; and therefore merits all the discouragement we can give it.*

It has been objected, that the plaintiff will be at a great [153] expence: For my part, I have no objection, when gaming is put in practice, that both sides should dispose of part of their money in *Westminster-Hall*. The plaintiff, if he has expence, will have it only in damages; the defendant, in all events, will have the costs to pay. And I shall be perfectly well satisfied if the trouble, and some share of the expence, fall on both, that they may learn on each side, to quit these methods of gain, and apply themselves to a more certain and safer, as well as more honest way of livelihood.

Justice *Willes* was for letting in a new party, who might not have the personal objection against him as *Coote*. Lord *Mansfield* said, that was not necessary, as he would take care to inform the jury, as to the other parties, that his conduct, in selling at one price and buying at another, was not to be taken against them, as *argumentum ad hominem*; but as insight for settling; and that it might go to establish the price for 6l. 18s.

Mr. Justice *Asbhurst* said, he should not have been for a new trial, though perhaps he differed from the jury; (there was contradictory evidence, and then it was their right to choose had it not been that so many other actions depended on it, which it was very hard to preclude the parties, by judgment by default. He observed, the counsel did what the experience of the court must justify: *Would not weaken strong evidence, by adding to it.* That he should not therefore condemn him; but thought, that the witnesses, collectively, might be of consequence, as to the other actions, which were to abide the fate of this.

Bail.

Bail.

NO Sheriff's officer, or other person concerned in execution of process, shall be bail in this court.

Notice to Lessee.

If landlord gave tenant notice to quit, or pay such a rent, and tenant holds over, landlord may bring an action for use and occupation, and shall recover the rent specified in the notice.

[*154]

ON a question, Whether a landlord may not recover what rent he shall have demanded in a notice to quit, in case the tenant does not quit at the term.

It was objected, that by the statute of 4 G. 2. c. 28. If any tenant for term of life or years, hold over beyond the expiration of the term, the landlord shall recover double damages, by an action of debt, for the yearly value. Defendant must put in special bail, and shall have no relief in equity: That this was a very favourable act * for the landlord; he must therefore keep within the terms of it, and not come for a remedy of his own invention.

Lord Mansfield—A man cannot hold over in spite of his landlord, and at a rent different from what is demanded.

Note. It seems therefore, in action for use and occupation, the landlord may recover the new rent set in the notice; and that holding over afterwards is an assent to that new rent.

Crawford against Witten.

DEBT brought by administration on a foreign judgment. It was upon a debt on which judgment had been entered in the Mayor's Court of *Calcutta*.

On demurrer plaintiff assigned cause, on non averment of letters of administration.

2dly, That an *assumpsit* does not lie here in *England*, on a judgment recovered in *Calcutta*, because they are governed by different laws, of which we cannot take notice in the courts in *England*.

Suppose gaming lawful in *Bengal*, and debt thereon recoverable in *Bengal*, would the court here create an *assumpsit*?

Vernon 540. In the case of a note given, the statute of limitations was pleaded: The note was given abroad. The Lord Keeper declared, that the statute of limitations could not be pleaded; but *indebitatus assumpsit* might be pleaded.

This

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This last was not judicially determined. [It was not before the court.]

If we admit an *assumpsit* in any case, we must admit upon every foreign action the laws of every nation, however repugnant to those of *England*.

Lord *Mansfield*—I believe there is but one case determined on the point, which was in Chancery, and, I think, decisive for the plaintiff: But, *I think there is no need of any—on a promise, confirmed by judgment in a territory subject to Great Britain, the court will not look whether gaming is lawful at Bengal.*

Mr. Justice *Aston*—The court has no doubt about the matter; and they admitted the *assumpsit* by their demurrer. When an action comes properly before any court, it must be determined by the laws which govern the country in which the action accrued.

Information.

[155]

IN the case of a very poor person, Lord *Mansfield* observed, that proceeding by information was not the proper manner. On the case of a *Leicestershire* fidler, brought up by information, Lord *Mansfield* observed, the ground of this rule being laid down by the court, was taken.

Information.

IF a charge is simple, and denial has other circumstances coupled with it, which are not in the charge, it induces a violent presumption, that the denial is evasive and deceitful.

A denial coupled with circumstances in answer to a simple

charge, infers suspicion of fraud.

Stamps.

IT was questioned, where there is one plaintiff, and several defendants, and eight different debts assigned on affidavit, whether the stamps be necessary to all eight severally, with penalty on each for omission.

Lord *Mansfield*—I will not, without any authority, suffer the constant practice of this court for thirty years to be broke through, and not of this court only, but, the master

O

tells

tells me, of the Common Pleas; especially when the expence to the suitors would be so enormously encreased.

Amendments.

A L. L. rules to amend, are with payment of costs.

Composition where the whole penalty is to the party grieved.

Composition on a penal statute, where the whole penalty is to the party grieved. Action on 32 G. 2. which gives gold to the party grieved by bailiffs in arrest, extorting unjust fees, or any other mal-behaviour of bailiffs to persons under arrest: And it was questioned, whether the party grieved could compound without leave of court? The court was clear of opinion, according to my note, that they might—*Sed qu.*

[156]

Costs.

Privilege.

MOTION, That the defendant's attorney might pay costs, the defendant being a Member of Parliament.

The court would not grant the rule, but said, the proper process against a Member was by sequestration; and that it would hurt the practice of the court to grant the rule.

Rex against Curril and others.

ON a motion for a new trial, on indictment for conspiracy, the defendant having been found guilty.

It was on charging one *Farral* with forging a will, under which he took a pecuniary interest. The draught of the will was in the testatrix's hand writing. Divers expressions of *Curril* testified, that he had done for *Farral*, and, that on *Farral* being committed, one of the defendants said, "We shall be soon worth 500l." And that *Curril* said, "We must take possession of the hotel," meaning *Farral*'s house. Again, that *Curril* said, on another occasion, "I have done the job: We must take possession of the bargain," meaning *Farral*'s house. That he said to *Farral*'s wife, "I have authority to seize the goods; for your husband will be hanged: And you will see him go up *Holborn Hill*." That Mr. *Ryanfen*, who had been employed as an attorney for *Curril*, being told, that it was a felonious affair, left it, and would have nothing to do with it.

This and more evidence was reported by Lord Mansfield on the side of the prosecution.

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On the side of the defendant, the evidence reported was nearly this :

That one of the witnesses had said, he thought there was room to litigate the will.

Another set of circumstances of strong evidence against *Curtil* was, that of one *Lee*, that the will of the testatrix was produced before *Curtil*, the draught of it all in her own hand writing. That *Curtil* not only said he had authority to seize the goods, but pretended a false authority from Sir *John Fielding*, and thereon got *Irish* chairmen to carry them off.

Lord *Mansfield* closed his report by saying, " There is [157]
" very strong evidence ; and the jury found *Curtil* guilty :
" And I can see no ground for granting a new trial."

The counsel for the defendant employed much time in endeavouring to exculpate the defendant, as acting hastily and improperly, but not maliciously. And he went on by saying, that whether the evidence was sufficient to support the charge, must be left to the court. In criminal cases the custom of ordering new trials is as ancient as we can trace back by the books. In civil cases the jury were subject to an attain, which made new trials come in much flower. * So they were in criminal, vide Hale's Pleas of the Crown.

Lord *Mansfield*—Can you shew that ? For I thought the first new trial in a criminal case was granted in the case of the *Jew*—the *King* and *Goddard*, before Lord Chief Justice *Lee*.

The counsel cited *Levinz*, in which a motion for a new trial, on the part of the *King*, was made : But there it was said, that the defendant being acquitted, ought not to be tried again, and put in danger. Justice *Windham* thought this not necessary to be observed, as it was not matter of death : But the court said, in all criminal cases that rule held ; but that if defendant had convicted, there might have been a new trial.

Lord *Mansfield*—I don't find one before Chief Justice *Lee*.

It was admitted afterwards, that none had been actually granted before.

Lord *Mansfield*—There is no doubt now, that now-a-days, on proper ground, we would grant a new trial. But there was not a tittle of ground for the charge [against *Farrall*.] If they had meant favourably, they would at least have begun by a civil action. When *Eyanfon* was advised to quit having any concerns with them, and had left them, to avoid

Ex facto
oritur jus.

avoid this business, being told it was a felonious affair, *Curril* said, "If I had known the matter, I would have done for him." *It is not necessary to prove an actual conspiracy, nor expressed malice; a conspiracy and malice is to be inferred from the circumstances taken together.*

The seizure without authority; the many other circumstances I have urged already: Does this look like the behaviour of a man acting innocently, and not with a design of conspiracy? *If we were to grant a new trial, we should be thought, either to suppose the evidence not proper to have been laid before the jury, or that the consequence they drew did not follow properly from the premises; neither of which is my opinion.*

[158]

The Judges *Aston* and *Asbursft* were of the same opinion. Mr. Justice *Willes* was not on the bench.

Curril defended himself on his belief that there was a just ground; and did not enter, I think, into any other material circumstance of defence.

Lord *Mansfield* desired to see the warrant.

The information of *Catherine Honeywood* before Sir *John Fielding* was read.

The substance of it seemed to be this: That she was chairwoman to *Catherine Butler*; that she saw Mr. *Farral* write several times over the name of *Catherine Butler* the testatrix; that she threw the pieces of paper he had so written into the fire. That he shewed a paper to one *Turberville*, which he had so written, and asked him whether it would do? *Turberville* assented, and produced a paper, importing to be the Will of *Catherine Butler*, and *Farral* signed it *Catharine Butler*. There was a positive charge of forgery; and this *Turberville* was never wrote to to prove or disprove the assertion. It is said he is mad:

As Mr. *Curril* was entering largely into his defence,

Lord *Mansfield*—Mr. *Curril*, I should be very glad to hear what you or any in your behalf have to offer; but this was not before me on the trial; and therefore I cannot hear it.

Curril said, he was going to have spoken to it on the trial, but Mr. *Wallace* would not let him.

Lord *Mansfield*—Very properly: For you would not have given evidence to the jury in your own cause; nor to me in their hearing.

If you have any affidavit to your insufficiency or character, we shall be very glad to hear it.

Affidavit

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Affidavit of the poorness of his circumstances, and that he was not worth 50s.

JUDGMENT — *Fine 1s. Imprisonment for six calendar months.*

Attachment.

[159]

MOTION for an attachment for not obeying a rule of court. Not granted; but instead of it, a rule to go before the master; otherwise an attachment, *nisi causa.* Rule of practice.

Practice.

YOU can't have regularly a rule for an attachment against the sheriff for not bringing in the body, till you have excepted against the bail. Terms of trial at bar vide 3 Blackstone, ch. 23.

Trial at Bar.

HIS lordship would never consent to one without production of all deeds and evidence in writing which each side intended to make use of on the trial. And said, *the counsel should never consent to a trial at bar without these terms.*

The terms agreed on in the usual manner, and the judgment to be final and conclusive by consent. This Lord *Mansfield* observed, was no more than might have been compelled in a court of Chancery, but with great expence.

One side relying on a particular register, and saying it would decide the cause; and the party on the other side saying he should be very sorry to have it tried without; and a third person being in possession, and refusing to permit inspection of it; the court at first declined granting the rule; but presently Lord *Mansfield*, and the rest of the court, granted a rule for a trial on the first *Saturday* on next term. But Lord *Mansfield* observed, that this part of the rule would not bind them, unless inspection was granted; and desired them to intimate to the party in possession, that the court would compel him if he should refuse to produce the register; it being public evidence.

Lord *Mansfield* had observed, that though the general rule was not to grant the trial at bar on an issuable term, yet it had been granted, and would be done on proper occasions.

'Time for
new trial
on new
discovery.

NEVER too late to move for a new trial on a new discovery; which will take it out of the general rule of four days, if you apply in due time after the discovery made.

Grosvenor against Gape.

IN this matter, a rule of the court of Common Pleas having been attempted to be invaded, the court of King's Bench here very much discouraged the motion.

The court of Common Pleas had granted costs against the plaintiff in this court; upon which the defendant here in the King's Bench moved for a rule to shew cause why proceedings should not be staid till payment of costs in former action? The plaintiff in the new action came before this court to shew cause against the rule, on suggestion of mal-practices by suppression of evidence. Many objections were thought by the court to lay against the application. They thought that every court should have such regard to its own proceedings, as not to suffer them to be eluded by an application to another. That the Common Pleas should have been applied to; that the plaintiff must find security to pay costs, as the court should see fit on hearing, or else that he must apply for his remedy in the Common Pleas.

The plaintiff had grounded his defence in the Common Pleas on an action in this court.

Morgan against Jones.

THIS cause came on before the King's Bench, Hilary term 1773, for the opinion of the court, to be returned on their certificate in chancery, and was thus:

Sir Thomas Morgan, previous to his marriage, was seised of various estates; particularly in the counties of *Mormon* and *Glamorgan*; partly in *Borough-English*, partly in *Gavelkind*: And makes a settlement, in consideration of marriage with Lady Rachael Cavendish, to himself for life; remainder to trustees to preserve contingent remainders; remainder to his heirs-male by Lady Rachael; reversion to himself in fee. This settlement was made in 1723, and contains provisions for portions for younger children. And he covenants to convey two small copyhold estates and also a freehold. He purchased several freehold and copyhold estates

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after the marriage, and in 1725 mortgaged his freehold and another part of his estate to Mr. *Paget* for 11000*l.* the 3d of *April* 1731, having issue four children; *William*, born in 1725; *Edward*, *Rachael*, and *Elizabeth*, [the defendant, now Mrs. *Jones*, then about two years old] he makes his will; (his lady being, 'tis stated, supposed then pregnant) and first, he gives his jewels to Lady *Rachael* for life, and after her death to his son *William*, and if he dies without issue, limitation to *Edward* absolutely. The house in *Tredigan* to his son *William* and his heirs for ever; the furniture to *William* for life, with like limitation over to *Edward*, on failure of issue of *William*, as of the jewels. The rest of his personalty he directs to be applied by the trustees of the settlement for payment of debts and legacies.

He directs his youngest son *Edward*, by name, to surrender certain lands held in *Borough-English* to the use and behoof of the eldest, his heirs and assigns for ever. Then he limits the estates in *Brecon* in manner following: To *Edward* the customary lands, which were mostly gavelkind, for life, with trustees to preserve contingent remainders; remainder to the first and every other son in tail-male; and for default of such issue, remainder to the eldest son for life, with like remainder over; and for want of such issue, to such son as shall be born to the testator after his decease, (limitation of the *Monmouth* and *Glamorganshire* estates in like manner, as of the former, to the two sons, only the elder preferred) and in case, and if it shall so happen, that his said sons *William* and *Edward*, and any after born son shall die without issue male of their bodies as aforesaid, then and in such case he devises, for want of such issue of his sons then living, and of any son or sons lawfully begotten, and hereafter to be born, all the rest and residue of his real and personal estate not before disposed of, to his brother *T. Morgan* for life, with trustees to preserve contingent remainders; remainder to *Thomas* the younger for life, with like trusts to preserve contingent remainders; remainder to the heirs-male of his body; and for default of such issue, remainder for life to *Charles*, the second son of his brother, with remainder to trustees as before; remainder to his heirs-male; remainder to the right heirs of Sir *William* himself in fee. Here too in the limitations of the *Monmouthshire* and *Glamorganshire* estates, as to the customary lands, the younger is preferred as to the elder.

He

He appoints Lady *Rachael*, her brother the Duke of *Devonshire*, and his own brother, guardians of the children, in case they should be under age at his decease.

[162] There is a power given to his eldest son, and so to his youngest, when they come into possession respectively, of making leases, raising portions and jointures; the same power is also given to his brother *Thomas* and his heirs-male, when they come into possession respectively.

The words relating to the after-born issue are interlined in both places where they occur, and not taken notice of in the attestation.

The question sent out of Chancery was, *Whether Thomas Morgan the brother, Thomas Morgan the younger, and Charles Morgan, or any of them, took any, and what estate, in the counties of Monmouth and Glamorgan, by the residuary clause in the said will?*

All the issue living at the making of the will are since dead, except the youngest, Mrs. *Jones*, and without issue; nor was there any son after born.

The case was argued first in *Hilary* term, 4th *February*, 1773.

Mr. *Kenyon* stated the case as above—and then proceeded. I am to contend, that *Thomas Morgan* took an estate for life; his son an estate for life; and the sons of that son an estate in tail-male. We are to consider, whether the will is to operate at all? If it is, the question is answered. I am going to consider the devise as an apparent devise of the reversion in fee, expectant on the failure of the estates-tail under the marriage-settlement. I presume it will be said, that the reversion passes by way of executory devise, after failure of issue male generally. Whether there is a competent party to take; whether a competent instrument to pass, and in a competent time, will be, I suppose, questioned. If it should be said the limitation could only take place as an executory devise, 1 Lord *Raymond* 523. my Lord *Holt* says, a man seised of a reversion after failure of an estate-tail, grants it after such failure, this is no executory devise; but *from* and *after* only marks when the reversion should vest in possession.

He left his wife guardian, supposing she should certainly survive him.

If it should be thought children by another wife would have made an alteration, that event has not happened. If it had, the case of *Christopher* and *Christopher* might have made it doubtful.

Skinner—The words are to be governed by the intention of the party, whether there be legal words or no. It would be contrary to the intent, and pernicious, if more remote relations should be preferred. Now in our case he gives to his sons already born, his sons hereafter to be born, and for failure of such issue to Sir *Thomas Morgan* his brother, and his heirs-male successively. And if this be so construed [163] as to let in a supposed limitation extending to heirs of a future marriage, and this be interpreted to exclude Sir *Thomas*, then those who are no where expressly named, or necessarily understood, those whom it was not probable he should have or expect, or who, in fact, never came into the actual possibility of existence, would be made to bar the estate expressly limited over to the testator's brother, contrary to the plain intent, and almost every object of the will would be defeated.

If it cannot take place as a devise of the reversion, or a contingent remainder, I hope it may take effect as an executory devise.

If it is after failure of general issue, it is too late as a remainder; but he gives over his jewels, in case Sir *William* should die without issue at his death, then it may be understood so of the others, and so not too remote.

Lord Mansfield—I take the two grounds to be; first, That this is a will referring to a marriage-settlement; and so refers to the sons under the marriage-settlement: Secondly, That if it was with respect to sons by another marriage, it would create estates-tail by implication.

To this Mr. *Kenyon* agreed, and Serjeant *Hill* was preparing to reply, but Lord *Mansfield* being to go into the House of Lords, the argument was adjourned.

Feb. 8. Serjeant *Hill* for defendant—I am to support before your Lordship the claim of Mrs. *Jones*, as the only surviving issue of the testator, and heir at law. The question is, Whether by the residuary clause, *Thomas Morgan*, or his two sons, *Thomas* and *Charles*, took any and what estate in the counties of *Monmouth* and *Glamorgan*? I humbly submit the devise intended by the testator cannot by the intendment and words of the will; cannot by the

[* I don't find this case but in *Forth* and *Chapman* before Lord Chancellor *Parker*, the court went very far in order to restrain the words to issue living at the death; but still in such a manner as to distinguish remarkably between a term and a freehold; construing the same devise as to the freehold to be on failure of issue generally at any time; as to the term on failure at the death: And thus *et res magis valeat*. So that any thing then seemed to be thought easier than to adapt the same construction to real estates.]

rules of law, by the cases adjudged, be considered other than an executory devise. If that be admitted, his intent was contrary to the rules of law, and therefore is no intent. † He knew that he had two sons and two daughters at the time of making the devise; he knew there might be a default of that issue, and of the issue of any other marriage; in case of such default, uncertain in time, uncertain whether it should ever happen, he devises over—the very words are as strong as possible.

[164] “ Forasmuch as it is my intent and meaning, in case my
“ sons or any other son of mine hereafter to be born, should
“ die without issue male of them, or any one of them;
“ then follows (he repeats the words again) and in case,
“ and if it shall so happen, and for want of such issue of
“ my said sons *William* and *Edward*, and of any other son
“ or sons of mine lawfully begotten, he devises over—(then
“ and in such case, and if it shall so happen) to his brother
“ *Thomas Morgan* for life, with the several limitations over
“ for life, and in tail to the issue of his brother.”

This is of the second sort of executory devises (where no present fee passes, nor any immediate freehold is limited) [as *Fearne* 64.]

There have been several sorts proposed of estates, which may be supposed intended. Mr. *Kenyon* has mentioned them; and it shall be my endeavour to shew none of them can take effect.

1st, The brother can't take by remainder. A remainder is defined by Lord *Coke* as a residue of a particular estate depending upon it, and created by the same instrument: Here the estate is created at different times, and by different instruments. *More* against *Parker*.

Bryan—I apprehend there is no difference between a springing use and executory devise; but that one being created by deed and the other by will, the latter shall be more favoured, if the intent appear and be consonant to law.

I conceive, upon the cases above cited, if the testator be only seised of a reversion in fee, he can't by words ever so proper pass a remainder or executory devise of it. He might have said, *I devise the reversion to my brother, and after to his sons*; or devised the estates in marriage-settlement *ex nomine*.

[Lord *Mansfield*—He has, I doubt, devised thus: “ All
“ my lands in *Monmouth* and *Glamorgan*.”] I apprehend

† Omne legibus vetitum impossibile.

there is no immediate devise ; because it is limited after the death of issue born, or hereafter to be born. There might have been a great chasm between the particular estate and the gift out of the reversion to his brother. Had he survived Lady *Rachael*, and married again, would the devise then have been good ? If it would have been bad, it is so : It was either good or bad originally : No subsequent event could make it good, if not so at first. *

The words *lawfully begotten*, and *hereafter to be born*, make [165] no difference ; any more than *procreatorum* and *procreandorum* ; which last equally applies to sons already begotten, as the first *procreatorum*, notwithstanding the seeming difference in grammatical import ; and so here lawfully begotten and hereafter to be born, is no more than if he said simply hereafter to be born.

Burrows, Goodman and Haskins, 873. Devise, reciting articles of marriage-settlement, to the heirs of her niece by a second husband lawfully to be begotten ; and on default of such issue, then over.

Question, Whether limitation is good as estate-tail by implication ? Whether as executory devise ? Whether the devise, the event never happening to the issue by the second husband, should be thrown out of the case ? It was said, that it might have been contingently too remote as an executory devise ; and *if bad in original, never could be made good.*

[Lord Mansfield—*You need not cite cases : 'Tis a principle.*]

Estate-tail by implication to the sons of a second wife is the second mode, and is therefore inconsonant with the former, which supposes the issue to be intended of Lady *Rachael* only : Arguing on both infers that both are uncertain ; and that uncertainty I apprehend is as strong against a will as a deed.

But if I prove to your Lordship that he never intended to raise estates-tail by implication, they can never be created. Suppose a man has an only son, makes an estate in trustees to the use of his son for life, without impeachment of waste ; then immediately on the death of his son, remainder to the heirs of his son in tail. If before the birth of a grandson, the son by feofment or any other way alien, your Lordship will not support the estate-tail, why is this but because the

* Quod ab initio non valuit tractu temporis non convalescit.

estate in trustees cannot be raised by implication to preserve contingent remainders.

What I mainly contend, my Lord, is, that the intention is contrary to law ; there are many cases adjudged, and of the highest authority, a determination in the House of Lords, which is *Laneborough* and *Fox*, determined in the House of Lords in the time of Lord *Talbot*.

[166] I shall come to that case presently, but *Vaugh.* 259. I shall cite first, believing its authority has never been so much as questioned. I shall take the very words of the will.—
After trusts appointed for payment of debts out of a leasehold estate, if other personalty not sufficient, provision for raising portions for daughters ; and after payment of debts and portions, the rents and profits of the same to his son.—
“ My will and meaning is, that if it happen that my son
“ *George, Mary* and *Catherine* my daughters, should die
“ without issue of their bodies lawfully begotten, then all
“ my freehold lands which I am now seised of shall come,
“ remain and be to my nephew *William Rose* and his heirs
“ for ever.”

Lord *Vaughan*—The law does not approve estates-tail by implication. Estates-tail by implication, which is only constructive, shall not be good to the disinherison of the heir at law. It must be a necessary implication: I call that a devise by necessary implication, to *A*, when *A*. only can take.

If in that case the intention of raising estates-tail by implication was not necessary, and therefore not admitted, I apprehend the same reason will hold here with equal strength.

4 *Mod.* 316. *Moor* and *Parker*. A case which has been mentioned to another purpose. *George Chute* the father being seised, made a settlement to *George* his son for life, remainder in tail-male, reversion in fee to *George* the father. He made his will, providing, that if his son's wife die in the life of her husband without issue male, then the son shall have power to make a jointure to any other wife : And for want of issue male by his said son, then to his son by any other wife ; 4000*l.* to his granddaughter. And in case of failure of issue male by his son *George*, then all to his grandchildren and their heirs.

The question is, Whether *George* had an estate-tail, share and share alike, or for life?

It would be impossible to create an estate-tail, by tacking the words in the will to those in the subsequent limitation ; because the settlement and will are two distinct conveyances.

Another

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Another case there is, a very strong one, I apprehend.

3 *Mod.* 104. In ejectment, special verdict—Testator being seised in fee, had two sons and four daughters, and makes his will, containing *inter alia* as follows: Item, “I give my estate to *Nicholas* my son, and if it pleases God to take my son, then to my daughters share and share alike: And if any of my daughters die without issue unmarried, then her share to the survivors: And if all my sons and daughters die without issue, then over.”

Here was an apparent estate for life (with a very strong probability of intending to carry it further) and yet the court was of opinion no estate-tail in the daughters.

Laneborough and *Fox*, I apprehend, is a case in point; [167] both against the restraining the words *hereafter to be born* to the children of *Lady Rachel*, and against raising estates tail by implication. Determined by eight of the judges. Estates in trust to preserve contingent remainders. *James Lane* was tenant for life; remainder to his heirs male, as purchasers.

James Lane, the father, seised of the reversion, makes his will; a devise to *James*, and says, “If my son *James* die without issue,” meaning plainly, to take in his daughters; remainder over. It was resolved *Frances*, the daughter of *James*, who died without issue male, should not take.

It would not hold, in our case, that to raise estates-tail by implication, nor by restraining issue, so as to signify issue male only: Nor here to restrain issue, so as to signify issue of the marriage only.

This must be the reason why *Mr. Kenyon* entered a protest against citing cases, by saying, every will stood on its own ground.

I must say, this is not only an estate which is not limited so as to take place according to law: But that no lawyer in the house, without altering the intent, could make the devise consonant to law.

[*Lord Mansfield*—To be sure, it is a very important case, though very imperfectly reported in the printed cases, which make an impossibility, by making the senior judge speak first.]

The case cited from my Lord *Raymond* is not his own report, Here was limitation in tail male to the sons of *James*, the younger, as appears by express limitation in the determination in the House of Lords, tho’ omitted in Lord *Raymond*.

Badger and *Lloyd*. *John Lloyd*, sen. conveyed the lease and release to the use of himself, for ninety-nine years, if he should so long live; same remainder to *John*; remainder to

to *Elizabeth*, wife of *John*, for life, remainder to trustees during the life of the two *Johns*, to preserve contingent remainders; remainder to the issue of *John* the younger, in tail male; remainder to himself in tail male; reversion in fee. He had four sons, and by his will devises after the death of *John* the younger, to *Thomas*, the second son, in tail male; remainder to *Paul*, the third; remainder on his death without issue male, and none of the brothers living, to the fourth, in fee.

[168] The reporter makes it said, the will is revived, which is nonsense. It is better reported in *Salkeld*, though not exactly. If he had disposed of the reversion under the marriage settlement, it would come within our case.

[This was determined a vested remainder in *Peter*, the fourth son, and the court said, this was the case of a reversion expectant on an estate tail, devised after death of tenant in tail, to another in tail: This not an executory but immediate devise; and from and after only declares when it should vest in possession.]

Holmes and Meynell. There was an express devise to the daughters, and the heirs of their bodies; remainders over. Here it was evident, that he meant remainder to the survivor on the death of either. If there had been more than two, they would not have raised an estate tail by implication. If the question had been, how the after-born sons were to take, in our case, it might have applied.

The reason against raising estates tail by implication between more than two, is the uncertainty of the estate. This, then, applies rather more against *Mr. Kenyon*; for there might have been more than two after-born sons, and the uncertainty of what estates, and in what manner they are to take, affects the question as much on that ground as it does *Holmes and Meynell*.

Hob. 313. *B.* seised in fee, makes a conveyance to *A.* remainder to *B.* and *C.* successive, without saying *sicut nominati in charta*. *B.* and *C.* can't take immediately; they are not parties to the deed, and the remainder void for uncertainty. I suppose this affects the devisee as well as the grantee. *The title of the heir at law is a certainty: It must be defeated by something as strong as itself.* If there be two wills, and priority or posteriority is doubted, neither can take effect.

If devise to *John Smith, Esq;* of the county of *Middlesex*;

for; remainder to his two nephews, and there be two persons answering the description; the whole devise is void.*

If I remember, Mr. Kenyon says, he devises an estate tail to the sons already born, in express terms, exclusive of the after-born sons. Therefore, there is no estate tail by implication to the after-born sons; and yet, by and by, he maintains an estate tail in those after-born sons, by implication; and this, he says, is *noscitur ex sociis*: Whereas I think, it is rather *noscitur ex dissociis*. [169]

I think, I have proved, that it can't operate as a remainder; nor as restrained to the sons of Lady Rachel; nor as estates tail, by implication, to the after-born sons; nor as a disposal of the reversion under the marriage settlement; therefore there remains only that it should operate as an executory devise, which cannot be, I humbly submit, consistent with the rules of law, nor with that uniformity of decisions necessary in judgments, and which, I am confident, your Lordship will always maintain here, as long (and very long may that be) as your Lordship shall preside in this court.

Mr. Kenyon, in replication—I have looked into more reports than I have cited, by some fifty: Many of those cited on the other side, I thought were to be passed over, as they did not seem to be to the point. The learned Serjeant opened with a rule, which, I hope, will decide the point, *That the testator's intent ought to take place, when not contrary to law*. We differ only in our conceptions of it's agreement or contrariety. In the case of *Robinson and Robinson*, the court determined a different estate to what the testator certainly meant: But the testator's primary intent was, that devisee should take; and the court would fulfil that intention as far as by law they could. It is not pretended here, that the heirs of Sir Thomas Morgan are incapable of taking; how they should take, the court will see.

I did not quote *Holmes and Meynell* as a case in point, but for the sake of Lord Chief Justice Pemberton's judgment in *Skinner*.

In

* I believe it will occur to every reader, that the devise is only void in such case, if nothing can be found to explain it upon the will: In which courts will catch at the slightest circumstance, to determine the person, rather than the will should fail; nay, even parol evidence has been admitted, in favour of a will, upon such a case, to explain the person intended: So that courts have, of late, at least, and perhaps upon the general principle, and the directions of the statute of wills, for the favourable construction, rarely, if ever, been disposed to let in the heir against the express declaration of the testator, who appoints another, while there was any possibility of tracing out, by any means of receivable evidence, who that other was.

In the case in Lord *Vaughan's* Reports, 259, the intention of the proposition there laid down has been much doubted. Lord Chief Justice *Wilmut* said, that he had often doubted the position there laid down, that an heir cannot be disinherited but by necessary implication. That he could wish there had been added, *or plain intention*.

The case of *Lanesborough and Fox*, I understand, was an estate for ninety-nine years to *James Lane*, and after, an estate to the heirs of his body. The Lords were of opinion, that the estate of *James* could not be enlarged by implication. I will venture to say, that it cannot, being only a chattel interest, be enlarged, even by express words.

[Lord *Mansfield* said, there was no question there about the heirs of the body of *James*.]

[170] I hope, either by exclusion of the after-born issue, or by raising estates to them by implication, the limitation over may stand to the heirs of *Thomas Morgan*.

Lord *Mansfield*—As at present advised, I cannot wish a farther argument, the subject has been so well argued on both sides; and all that can be said on it seems to be exhausted: But if the parties desire a farther argument, shall certainly give it.

On motion made on behalf of Mrs. *Jones*, the defendant it stood for farther argument.

12 February, 1773.

Whether the meaning restrains the words to the sons of the first marriage.

Lord *Mansfield*—The only ground you went upon to support it, as an executory devise, was a dying without issue in the life of testator. This, I think, is not within the intention of the testator, and therefore, it did not strike me. The words would carry to the issue of the second marriage. If the meaning restrains them to the first, there will fall the question.

Whether a double contingency.

But, suppose the meaning of the will don't confine the words to the first issue, then, whether there is not a double contingency. And though in the case of *the Duke of Norfolk*, such double contingency was thought too remote, yet I need not quote *Saberton* and *Saberton*, and many other of the modern cases, where it has been held, that if the second contingency never arises, (as in this case, if there were no after-born sons) then the devise over is good, as within the time of law.

I speak no opinion; but would hear every point argued.

Question

Hilary Term, 13 Geo. 3. K. B.

Question too, Whether here is not an exprefs devise to the after-born son? who has a power given him, whenever he shall be born, &c. to appoint jointure, and make leases, in the same manner as the other sons.

Whether the after-born son does not take by express devise.

The case came on again *Trinity* term, 4th of *May*.

Mr. *Dunning*—This case comes before the court from *Chancery*, for the opinion of the court—I shall state shortly.

Sir *William Morgan* makes a deed of settlement previous to his marriage: Estates tail are given, in the usual manner, to his eldest and other sons; then reversion to himself in fee.

Then he makes a will after his marriage, and disposes of some estates to his youngest son, *Edward Morgan*, and the heirs male of his body; then to the eldest son, in like manner; remainder to son to be born after his decease; devises over to his brother *T. Morgan*, for life; remainder to his heirs male; remainder to himself, in fee: Thus of the estates purchased since the marriage. As to the estates which he considered in himself, under the marriage settlement; he disposes of his estates in *Monmouth* and *Glamorgan*, after failure of issue of his sons already born, and of any other son lawfully begotten, and hereafter to be born, to his brother, *T. Morgan*, for life; with remainder to the issue in tail male.

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He made this will the third of *April*, 1701, and died the 24th, leaving issue, *William* and *Edward Morgan*, and daughters, *Rachel* and *Elizabeth*. *William* died an infant, in 1740; *Edward* at the age of twenty-one, in 1746; then *Rachel* died without issue, and *Elizabeth* only survived. At this time the question in all wills, is the clear intention, which it's the duty and inclination of the courts to follow.

Sir *Charles Morgan*, nephew of the testator, was living at the time of the testator's decease, and entered on the death of his father and brother, and is in possession. If the daughter take, it will be contrary to the intention of the testator. If the words *after born son* are considered as preferring such issue to his brothers, they may be understood sons of Lady *Rachel*, under the marriage settlement.

That testator meant Sir Charles should take before his daughter.

This will was made in the testator's last illness: I think, we may assert, he must have meant after-born sons, or sons of whom Lady *Rachel* might probably be enſient, and who might be born after his decease. Besides, in his will he makes Lady *Rachel* guardian of these after-born children; which she could be of no others but such as were

That by after-born sons, he must have meant of Lady *Rachel*.

to be born of her. If it should be presumed, the hardship would have been great, if he had got over the then illness: Either in that case he would have had an opportunity, and inclination, probably, on having children by a second marriage, to have altered his will, or, if he had not altered it, it is determined on the concurrent testimony of Sir *Eardley Wilmot*, Lord Chief Justice *De Grey*, and Lord Chief Baron *Parker*, that a marriage and children was virtually a revocation of a precedent will.

That the contingency of after-born children, whatever it meant, never happening, the next remainder took place immediately.

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But take this meaning as large as possible when he had no after-born issue, the next remainder, in the intention of the testator and operation of law, takes immediate effect. If the court over-rules this ground, they will over-rule not only the authority, but, which is more, the good sense of many concurrent determinations. But it is said here is no absolute devise; and estates-tail must be raised * by express words or necessary implication. What necessary implication means, but plain implication, I can't tell; and if it means any thing more, I apprehend it would not have been used at this day: No cross remainder would ever take effect by necessary implication. I understand the court dropt something last Term about a contingency with a double aspect, which is a quaint phrase I do not perfectly understand—But if it means, as on trust on one event, the entire estate-tail to one person; and if such an event happens, then the entire to another person; I take this not to be such a contingency: But this is so far a contingency with a double aspect, as to have consideration of the after-born sons, and if none are born, then on that contingency, a disposal looking immediately to the heirs of Sir *Thomas Morgan*.

What is meant by a contingency, with double aspect.

Lord *Mansfield*—Are you not aware that a double contingency is, as in the Duke of *Norfolk's Case*, where there were three or four such contingencies.

[*Saberton* and *Saberion* there quoted; *Stanley* and *Leigh*. If a son is born, he takes the whole estate immediately; if no such son is born, then the devise over is good. I don't consider this as immediately affecting the case, but only *quæcunque viâ datâ*, it was taken hold of to set the argument in all its lights.]

This is an estate of inheritance. I admit it would not be good as an executory devise; that there is no express limitation I acknowledge: However, there is an implied one. Then as to the power of jointuring to the after-born sons—

Lord

Hilary Term, 13 Geo. 3. K. B.

Lord *Mansfield*—This struck me very much : But I take it 'tis only of the estates he was seised of in fee, not of those in *Monmouth* and *Glamorganshire*.

I understand that after the death of the elder brother, the younger son was to take all, and would be in possession of the whole ; and as to which estates are concerned, the proviso says, “ all the estates of which he was or should hereafter be in possession ;” and that the same power of leasing and jointuring should be on one, and not on the other, or in a different way, was unlikely : And this power is to arise on and not before their coming into possession ; so that though it could not take effect, perhaps, as to either of the sons provided for under the marriage settlement, either as to the part into which the youngest was to come first into possession, or that into which the eldest ; yet as to the other-born sons, it might take effect ; and then there is a devise by implication, or else the after-born sons may be meant of the sons of Lady *Rachel* only, and if that be the case, it makes for us. And lastly, as I understand, the case of *Lanesborough* and *Fox* is made of importance to the point ; If my learned friend shews in what they agree, I promise to shew in what they differ. [173]

Lord *Mansfield*—I contend, that neither the brother, nor the two sons of that brother, took any thing under the will, by the residuary clause. I maintain it to be an executory devise after an indefinite failure of issue ; and therefore too remote. The intention of the testator will be supported, but not against the heir at law ; except upon clear proofs. The intention of the testator also, however clear, cannot be complied with, if not consonant to law. The residuary clause is, “ As to all my estates not hitherto devised, I give and bequeath, in case my sons, born and hereafter to be born, die without issue of their bodies, lawfully to be begotten ; then, in such case, and if it shall so happen, I give and bequeath to my brother, &c.” He speaks, as plainly as possible, of estates not hitherto devised : He gives expressly, after a general and indefinite failure of issue. It will never be said, that if Sir *William* had been advised by an able conveyancer, he would have made a devise consonant to law, if he did not make such an one, but one quite the contrary.

As to the meaning of the words, “ after-born sons,” I cannot see any gentleman arguing this point ; has spoken with certainty, what after-born sons means, the heir at law shall come in, if it be uncertain ; but that it is general, is carried too far ; and that estates-tail cannot be raised by implication, where no present estate is given.

For the defendant.
That it is an executory devise ; too remote, and therefore void.

That for uncertainty

certainty, which of the two meanings the testator had; whether a general failure of issue, or of issue by Lady *Rachel*. Both cannot be maintained; and then, for the uncertainty, the heir at law will come in. But I apprehend, whatever he possibly might intend, he has made the devise so general, that it cannot be restrained to sons of Lady *Rachel*. As to estates tail, to be raised by implication to all the after-born sons, I believe there never was such a raising of an estate to persons who had no previous estate given them. Where a man gives an estate to his son after his wife's death, an estate for life is indeed raised to the wife; but it is by an implication strictly necessary. But I contend, no estate has ever been raised by any lower degree of implication without a precedent estate.

Uncertainty.

Gardiner and *Sheldon*. In the case before cited, *Holmes* and *Meynell*, the court take notice, that they can't give an estate to the sons, because they do not know how and in what order they are to take. Here Sir *William* has not given a hint, whether they should take for life, remainder in tail; whether they should take by cross remainders between themselves; whether successive; or how.

Want of estate precedent.

Cummins. That no estate tail was raised by the words, "For want of issue male, or failure of issue male;" for want of a preceding estate. I think the case of *Laneborough* and *Fox* is very much to the point, where the question was, whether *James Lane* took any greater or other estate than under the settlement. The objection was precisely as in favour of Mrs. *Jones*: The court said, there was no necessary implication, and less was not sufficient.

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[Lord *Mansfield*--Had he not an estate for life?] Yes; but under the settlement: And those two estates could not be tacked together in two instruments. What Mr. *Kenyon* said did not seem to the case that the estate of *Lane* being for years could not be enlarged. The case of *Moor* and *Parker* is precisely the same as that of *Laneborough* and *Fox*, (except the estate for life) which, for the reason before-mentioned, and in the arguments of the counsel, and in the opinion of the house, seems to have been thrown quite out of the question. And then the decision was, that it can't take place as an estate by implication; and as an executory devise was too remote, what is the natural construction of the proviso? Why, it was as to the estates he came by after the marriage by purchase, and was seised in fee: And of such estates for life are made, to all who are to take in them. But, as to the re-

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nants in tail, they could even suffer a recovery, and bar the whole interest; much less do they want power to grant leases, and raise jointures. As to cross remainders raised by implication, where is the precedent estate to raise them out of?

As to the analogy from the cases of *Saberton* and *Saberton*, *Stanley* and *Leigh*, I take it, there is no argument from them in support of this devise; because in all those cases, there is an express devise to those after whose death without issue male remainder over is limited.

That no argument from analogy of the cases of *Saberton*, &c.

[Lord *Mansfield*—As to this case, I would explain the double contingency more clearly than I had done. “If my sons die without issue, then I give over; if I have another son, and he die without issue, then I give over also.”]

As to the disposal of them, the difficulty arose, that in case of real estate, an unborn person might bar the tail, when he came to the age of twenty-one; but in personal, it was thought that there was no bar, because there could be no recovery: And thence, I take, the difficulty arose. But the birth immediately is a bar in that case, and the whole estate vests. Mr. *Mansfield* concluded with observing, that as it could not be good, for the reasons he stated, as an immediate devise of the reversion, it could no way take effect, but as an executory devise, and as such, void.

Mr. *Dunning*—I admitted, in setting out, that the intention of the testator, however plain, cannot take effect, unless consonant to law. I admitted, that as an executory devise, it was not good; but it is therefore contended, (without a shadow of ground, that I can find) that Sir *William Morgan* meant an executory devise. Why throw such an aspersion on the memory of my client's ancestor, as to suppose he knew any thing about them, or their distinctions? or meant to make, or in fact did make one? The words, “then and if it shall so happen,” are the only words on which it is taken that he meant a future and not a present interest. I thought I had already answered this, and that no doubt was entertained about them, and, I think, the court still entertains none.

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It has been said, from some notes in short hand, which I do not expect to hear generally in these cases, that he can't mean after-born in both the senses; and therefore, that he meant neither. He must have meant one way or the other; and it is indifferent to me which he meant. As to what has been said, that in cross remainders there was a precedent estate always, the ground of all these determinations

tions has been necessary implication; in other words, plain intention: If the intent is either way plain, I can't see the necessity of such previous estate given by the will.

In the case Mr. *Mansfield* cited, where an estate for life passes by implication, there is no previous estate to the party; so that, I think, the case makes against the argument. As to *Gardiner* and *Sheldon*, the case was rested on the supposed uncertainty, and on that point, I don't think it quite sufficient.

The case of *Moor* and *Parker* was determined on the footing, that I can't take two instruments together. So was the case of *Langsborough* and *Fox* expressly, by what I have been able to see of the arguments and decision of the House of Lords. And if I contended, that two instruments should be tacked together, they would make against me, and I should be arguing against decisions. As to the point of jointuring, &c. my learned friend said, it was of no use to those who had an estate tail, but to those who had an estate for life. Then it was applicable to nobody; for it is taken in the settlement always as connected with such estates, to which Mr. *Mansfield* makes it useless. It is not, perhaps, useless to have the power of granting leases, raising jointures, &c.

Judgment
of the
Court.
Case stated.

Lord *Mansfield* delivered the opinion of the court in the following terms:

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Sir *William*, at the time of making his will, was seised in fee of several estates in *Monmouth* and *Glamorgan*, and also of equities of redemption, and of estates in *Brecon*; and had great estates in *Monmouth*, under the settlement. Estate to himself for life; remainder to the issue of Lady *Rachel*, in tail male; reversion to himself, in fee: With provisions in trust of the usual contingencies of a son's being or not being. Having, therefore, this reversion in fee, and seeing his eldest son greatly provided for by the marriage, he gives to his youngest son *Edward*, in strict settlement; remainder to *William*; then to the after-born son, whom he makes also tenant for life; remainder to his brother *Alfred*. The next disposition regards the question.—For the sake of the *bar* and *students*, I cite so much of the case. “Forasmuch as it is my intent and meaning, that if all my
“sons, and such hereafter to be born, and their issue male
“of their bodies, lawfully to be begotten, as aforesaid,” (which has nothing to be referred to but the disposal in fee precedent) “die without issue male. In case and if it shall
“so happen, that my sons *William* and *Edward* die with-
“out

"out issue, and any other after-born son without issue, then
 "I give the *remainder*, which is a word of importance, and
 "all reversions, &c. which are words in course, to my bro-
 "ther," in strict settlement, as before to his sons: And
 this he does with the same powers as under the marriage
 settlement: Remainder in tail male to his brother's sons;
 reversion to his own right heirs, in fee. The question
 arises, whether the devise not too remote? Before I come
 to this, a question arises, which is very material. Whether
 it is to be construed, though there are no words to res-
 train it, that the limitation in question extends to the sons
 he might have *by any marriage*, or those *by Lady Rachel only*.

Question,
 Whether
 the after-
 born sons,
 mean sons
 by any mar-
 riage, or
 by Lady
 Rachel on-
 ly?

There is a power given to his eldest sons, so to his young-
 est, when they come respectively into possession, to make
 leases; the same power is given to his brother *Thomas*, and
 his heirs male, when they come into possession succes-
 sively.

Question, Whether the limitation, as to all the lands un-
 der the settlement, is not void? If it is, the daughter is en-
 titled, as the reversion was in Sir *William* in fee.

Whether
 the limita-
 tion over
 void; if it
 be, defen-
 dant enti-
 tled.

It is contended, that by the after-born sons, is meant sons
 of any succeeding marriage; which, there being no previous
 limitation to the issue of such succeeding marriage, then
 there is a limitation of a fee; but such a fee which the law
 will not allow, but upon certain restrictions.

It has afterwards been contended upon another point.

*Most of the disputes in the world arise from words.** It is
 said a necessary implication must be; and this necessary impli-
 cation must be an impossibility to be otherwise. There never
 was such an one. A necessary implication is such as does not
 want a conjecture, but, upon the whole, cannot be doubted
 of.

What is ne-
 cessary im-
 plication.

In the case of *Corrington and Hellier*, a man by his will,
 meaning to make a family settlement, and to prevent the re-
 mainder from being barred by the tenant, he having no
 freehold, made an estate for ninety-nine years, *if he should*
so long live: The drawer omitted the words, *if he should so*
long live. It was not impossible he should give an estate for
 ninety-nine years; but Lord *Hardwicke*, on the general
 view of the case, thought the words were to be added, *to*
establish the plain intent. Serjeant *Hill*, in opening said,
 there was no doubt of the intention; but that it was not
 so expressed as to take effect by law. Mr. *Mansfield* pretty
 strongly

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strongly doubted the intention; and when intention is doubted by counsel, without argument, I own it goes a great way. Sir *William Morgan*, who had most amply provided for his daughters, being possessed of a very great estate, after default of heirs male of his body, under the settlement, gives to his brother, whether he thought of a second marriage, or no: Neither he nor the drawer plainly, had thought of an executory devise. Now I think, therefore, this devise may be supported according to the intention of the testator, *two ways*: First, if he had a view to a *second* marriage; if that had taken effect, according to what has very justly been said by Mr. *Dunning*, this *marriage with issue* would have been a *revocation* of the settlement and will; so that the brother would not have taken the reversion till after a general failure of issue male: But taking it, as I verily believe to be meant, of Lady *Rachel* only: The testator was in his *last illness*; the will three weeks before *his death*; he makes Lady *Rachel* guardian and *executrix*. He disposes of the remainder by these words expressly, *remainder*; not *remainders*, as considering what estate he had to give, and finding it was only what should be *remaining* in him after the failure of the estates particularly limited under the marriage settlement; this which remainder he gives, under that description, immediately to his brother, with the several subsequent limitations over to the issue; reversion to himself in fee still reserved. But taking the words *after-born sons* in the largest sense, what will be the consequence? That the sons of any other marriage shall take an *estate tail*.

In case I supply the words, “In case my sons:” The sons I have now, or any hereafter to be born son of any other wife, lawfully to be begotten, shall die without issue of their bodies, lawfully to be begotten, then remainder to Sir *Thomas Morgan*? What then? If Sir *Thomas Morgan* is not to take till after failure of the issue male; he not meaning to disinherit any of his sons; it then follows, that they take an estate tail. And the other sons are an *example* how they are to take it; *scilicet, successive*.*

As to the power of jointuring, &c. which is properly given to tenants in tail, if it extend to *all the sons*, as well on estates under the settlement as in fee, (and that part which impowers his brother, and the issue of his brother, when they

* Verba relata, &c.

Certum est quod certum reddi potest.

they shall come successively into possession, can't properly, I [178] think, extend to the settled estates) then it is, as *clear and express* as possible, an estate tail to the sons born, and after to be born, in the strictest sense; remainder in tail to his brother; reversion to himself, in fee. If we are to construe this as an executory devise, we are desired to *strain a construction, in order to set aside the testator's whole will and intent, which ought not to be done.* We shall make our certificate according to our present opinion; and if we should alter our opinion, we will have it argued again.

[It never, I believe, was farther agitated in the King's Bench: and the Lord Chief Justice made his decree according to the certificate; from which decree Mrs. Jones appealed to the House of Lords, and the counsel began to be heard, April 22, 1774.

At the same time a cross appeal was brought against the decree of the court of Chancery, concerning some copyhold lands under the same will; and both were proceeded upon together. The question upon the copyholds was before the Lord Chancellor, at the sittings after *Trinity* term, 1773; but, as the question which was before the King's Bench appears much the principal, it seems better to take together what relates to that, though, for convenience of the parties, both were argued together before the House: And I shall have principally taken the argument in such parts as were little or not all urged before the court of King's Bench; and which, though they did not seem immediately to affect the decision, appear to contain several useful points.

CERTIFICATE was returned *accordingly*, and the Lord CHANCELLOR made his DECREE pursuant to the CERTIFICATE: From which an APPEAL was had to the HOUSE of LORDS, and by the *advice* of all the JUDGES, DECREE AFFIRMED.

The King *against* Newman, and others.

On the Game-Act.

ON an information for undue conviction on the statute *Using a* against keeping and using greyhounds. *grey-hound merely, in company with a qualified gentleman who keeps it, is not within the statute.*

Mr. Newman, it appears on the evidence, convicted two persons who were themselves unqualified, but who were out with a qualified person; which they pleaded in their defence.

fence, and that the dogs were not their own. He said he knew it, and, turning to his brother justice said, "They are duly convicted," and obliged his brother justice to convict them. The information is against both justices.

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In this case it was said, on the part of the justice, that the convicted persons not being qualified by their own evidence, and it not appearing by any evidence expressly, that the person they were with was a qualified person, or that the dogs were, as they asserted, not theirs, but his, that the information might not be granted. It was farther said, that it has never been adjudged, that unqualified persons out with qualified, were free from the penalty; nor that it signified whether the dogs belonged to the qualified men, or to the others: For the being out to *use* them, was sufficient within the statute; or at least it had been much doubted—Serjeant *Burland*, for the defendants.

Lord *Mansfield*—Let the justice pay the whole costs, and go before the Master.

Serjeant *Burland*—Does your Lordship think them *sufficiently* qualified?

Lord *Mansfield*—Yes; and it's matter of tenderness to take it this way. I know you to be very judicious, and thought you led to it. The defence you set up for the justice was *none*; if it had been ever thought of by them.

I remember the case at *Exeter* of the poacher; the greyhound taken in his possession: Even a special jury had no doubt, but found for the defendant. *Keeping* and *using* are the words of the statute. Shall not a gentleman take any body out with him, to beat the bushes, and see a hare killed? it appeared too, on the evidence, that the summons was taken out on the *Sunday*, and that the parties asked an hour's time to go for Mr. *Linch*, the gentleman they went out with, who, they say, is worth several hundreds *per annum*. It is not pretended on the other side, but they might have brought this witness in three or four hours at least.

This, Lord *Mansfield* observes, with some of the above-mentioned, were very aggravating circumstances. However, you know the strength (he added) of your own case: Take it by way of information. Serjeant *Burland*, however, thought it advisable to desire leave then to refer it to the Master, which was granted accordingly.

The

The King *against* Sir Joseph Mawbey, and others.

ON the statute of 11 G. 3. against distillation of wheat, two hundred quarters found preparing for that use, in the proportion of one-third wheat to two-thirds barley.

Barley mixed with forfeited wheat subject to be seized with it.

* They took thirty quarters of the wheat the defendants prevented the constables from taking; and Sir *Joseph Mawbey* makes the constable a promise in writing, to surrender the aforesaid wheat, and desires the constable to seal: Afterwards, they turned the constable away, and altered the proportion to one-eighth of wheat to the barley. Thus they contrived to make an uncertainty in the quantity and quality of the commodity.

Setting up a mill to evade the act not sufficient.

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A servant of Sir *Joseph* deposes, as to the mixture in the proportion of one-third of wheat, and in the manner necessary for distilling. The seizure of the wheat by warrant, and the prevention; and afterwards, the shooting the wheat and barley together, in some degree by himself; and believes, the other servants might shoot more together, as they were ordered.

Coote Miller, one of the men who were commissioned to execute the warrant, deposes to the tenor of the warrant, and names the persons who were also to execute, and went together. Proportion one-third to two-thirds. Servants, with broomsticks, &c. prevented. *Furness* and *Thomas Mawbey* had the warrant shewed them before receipt of a note from Sir *Joseph Mawbey*, which says, if law will warrant them in what he understands they are about.

John Lumley—*Coote* desired to see whether the wheat was in the same proportion as before. Sir *Joseph Mawbey* lets him in, but won't suffer the quarters to be taken.

Rule to shew cause why judgment should not go against Sir *Joseph* and *Thomas Mawbey*.

Lord *Mansfield* made his report. Special verdict found, that *Mawbey* and his brother were traders in distillery; that they were not millers; that *Gough* had reason to suspect, that there were more than five quarters; that they found two hundred and fifty quarters, two third parts wheat, and one-third barley; that they found them so mixed, that it was utterly impossible to separate them. That on going to a second seizure, they found about an hundred and fifty quarters mixed, about one-third part wheat, and the rest barley;

ley; that Sir *Joseph Mawbey* and his brother violently resisted and obstructed the seizure; and, on the whole, if the seizure was *lawful*, they find for the plaintiff; if *otherwise*, for the defendant; and submitted to the opinion of the court.

[181] 11 G. 3. c. 1. prohibitory of exportation of wheat and wheat-flour, and the use of them in distillery, then if any distiller, &c. have more than five quarters of wheat or wheat-flour at one time, or any for his use, penalty enacted; then power on warrant from justices to constable, to enter and seize. There is an exception of grinders of corn and millers. The question arose on this, Whether the wheat ground, and flour so mixed with barley, was forfeited?

The old case was cited, if a man of his own act, mix hay with my hay, or money with my money, so that they cannot be separated, nor the part of each ascertained, the whole shall be mine.

Cro. J. Warn and Eyres. The question was on an action of assault and battery; the plaintiff violently threw some money into an heap of money of the defendant's. There it was said and agreed, that the plaintiff had no right to any part; that otherwise a man should be made a trespasser against his will.

On the other side, that by the 13 G. 3. (these are annual acts.) There is an authority to seize any mixture: So that the legislature thought with Sir *Joseph*.

The principal thing which seemed observable in Lord *Mansfield's* report was, that the jury found him and his brothers *not* millers. It appearing strongly on the evidence, that the mill was *not* worked, nor had tackle as of a grinding mill, within the statute, but was as a colour for the keeping the wheat, and applied to the purposes of the distillery.

The wheat appeared in the evidence about two hundred quarters, the barely four hundred and fifty quarters.

Lord *Mansfield* observed, it was very laborious to separate the wheat from the barley; and if the wheat had been mixed by their own fault, they could have recovered nothing.

The obstruction on the evidence appeared not very violent, consisting in threatening tongues, without beating them.

Note, In the pleadings before, in reply to the observation of the act since his resistance, providing for seizure of any

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any mixture, it was said, the act did thus *ex majore & abundanti cautela*. That in the case of embroidery, upon the act 22 G. 2. c. 36. with which, and the provisions of this act, a comparison had been made, there was a possibility of separating.

Lord *Mansfield*—I had no doubt at the time, nor any now. But the defendant desiring a special verdict, I thought it necessary, for the sake of a more solemn argument, to grant him that. I won't enter into what has been said by myself on the trial, being merely willing to hear the opinion of my brothers. There has been nothing new, but saying, the act of the present King is expository of the former.

Verba ex
abundanti
cautela su-
peraddita
interpreta-
tioni non
officiunt.

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But it has been made since this question, to shew the sentiments of the legislature, in case any question should arise in future. As to the cases in which the law, in other instances, has given a power of seizing forfeitures, though mixed, it has been done in things joined at the time appointed for the seizure, but separable in their own nature.

In cases of seizing of vessels, if the legislature means to say the ship, they will say so in express words. As to embroidery, it might have been separated from the cloaths. A doubt might, without this, be conceived, whether if embroidery only had been mentioned, any thing else could be seized? There is an exception of the millers.

Lord *Mansfield* observed farther, the seizure in a mill made no difference here, the parties did not come within the presumption. It is a temporary act, one of those seldom made to continue longer than a year, and, I believe, generally with a power reserved of being discontinued sooner, on ceasing of the occasion. It is made for the public benefit, on great exigencies. Whether Sir *Joseph Mawbey* mixed the grain, or bought it mixed, he is a trespasser against the law, and shall not avail himself of his own wrong. Therefore, I continue of opinion the obstruction to the seizure, made by Sir *Joseph* and his brother, was not justifiable. Were it otherwise, the act of the 11th of the present reign destroyed itself. There seems to me no doubt on the point; and the only question can be on the value, which was determined by the verdict, and was always in the same proportion.

Nemo lu-
crabitur de
injuria sua
propria.

The Judges *Aston* and *Asbburst* delivered their opinions on the circumstances principally with Lord *Mansfield*; only the former observed, that the act had no occasion to say, whereas a dispute has arisen, &c. and that on an action on the statute there could be no doubt about the number of the quar-
ters,

Hilary Term, 13 Geo. 3. K. B.

ters, nor of 5l. penalty for every quarter. The latter said, the case in *Popham*, of hay mixed, was to the point. That he could not agree with Mr. *Lee*, that his client did not know the law; but he did not mean to observe, but evade it: And concluded with a wish, that all who were in the same intention might find the same fate.*

Prosecutor being satisfied, COURT set a FINE of 6s. 8d. They agreed to take the sum of 500l. which was considerably less than settled by the verdict.

* *Dolus & fraus legibus invisæ.*

Ως πασχοίω και άλλος ότις τοιαυτα γε ρεζι.

Easter

Easter Term,

[183]

13 Geo. 3. 1773. K. B.

Eldridge.

BOND entered into by two obligors jointly and severally. The nominal obligor offered evidence to prove the consideration illegal: The Judge, before whom the cause was tried, excepted to the admissibility of the witness.

On this a new trial was moved; and, in the argument for the new trial, *Tomkins and Barnet*, 5 W. & M. was cited. Action on a bond entered into by three on an usurious contract. Usury was set up as a defence against the bond; and one of the obligees was admitted in evidence. There was also cited the case of *Gosling and The East India Company*.

Lord *Mansfield*, on this motion of Mr. *Buller*, mentioned a case at *Gildhall*. Two defendants in an action; question on admissibility; they were charged as partners. Said Lord *Mansfield*—I believe I admitted each as evidence against the other.

A council mentioned the name of the case, which he said was *Backhouse and French*, and that Mr. *Dunning* was council in it; but his lordship said he was not quite clear, what his opinion was upon that case; or, at least, that the reasons upon which he grounded his judgment had slept his memory.

Conviction.

ON a conviction on the statute against hawkers and higlers, the justice states that *A.* being one credible witness, Of licence and duty to be paid by hawkers
and higlers, vide 8 & 9 W. 3. c. 23. 9 & 10 W. 3. c. 27. 3 Ann. c. 4. 7 Ann. c. 7. 1 G. 1. c. 12. Of the penalty of forging a licence, vide 9 & 10 W. 3. c. 27. f. 5. Of not having a licence ready, or lending, vide 3 & 4 Ann. c. 4. f. 4. Of hawkers of unstamped newspapers, vide 16 G. 2. c. 26. f. 5. Vide *Burn*, title of hawkers.
witness,

[184] witness, swore that *B.* the person convicted, travelled from town to town as an higler. The affidavit of *A.* afterwards stated in the conviction, is, that the said *B.* sold him four yards of ribbon.

Conviction bad—because the matter that supports it is falsified by the affidavit.

Information.

Information, not proper to try a civil right.

THE court will not grant an information to try a civil question; except where the parties stand out against a trial at law.

This was on a complaint against commissioners, by act of parliament for lighting and paving, for not suffering their houses, &c. to be rated; to which they defended—that such houses were not within the district.

The court were of opinion, this was a subject more proper for an appeal than an information.

Appeal.

Appeal from quarter sessions final, and what relief may be had, and how.

WHERE a power of appeal to the quarter-sessions is given by Parliament, and that to be final; no other mode of trial can be admitted than that prescribed by the act; but on refusal to admit the appeal, duly offered, or want of due publication, pursuant to the act, the court will give the necessary relief.

Motion adjourned, till the party who moved has an opportunity to appeal against the next rate to be made; for that by this means, either the question would be dropt, or the rate tried; and either way those who moved for the information would have the object for which they moved.

Informality.

Stile of the court of King's Bench mistaken for that of the Common Pleas, vitiates the judgment.

MOTION against an execution levied on judgment of this court, on account of informality. The writ states the plaint before our Justices at *Westminster*, which is the stile of the Common Pleas—where it ought to have been “before Ourselves at *Westminster*, or wheresoever we shall be in *England*.”

Rule granted to set aside judgment and execution.

Return.

MOTION for an information against the mayor and burgesſes of *Nottingham*, for a falſe return to a writ of *Mandamus*. The writ recites, "Whereas it has been ſhewn, and that there have uſed, and ought to be, ſix junior counſel choſen; therefore *mandamus*, &c. to aſſemble and chooſe accordingly."

They return to the *mandamus*, that there ought not be ſix junior counſel choſen as above, at the time of the writ iſſued, nor before.

Evidence of election from 1712 to 1722, in the manner required by the *mandamus*.

Objection to the information, that there was no appearance upon the charter of ſuch mode of election, which ought to be ſtronger evidence againſt the uſage; eſpecially when for fifty years there had confeſſedly been none ſuch, than any they could offer, to induce the court to grant an information.

On the other ſide—that there was ſufficient ground for an information; and that this was the only way of bringing it before a jury: And that if the right had once veſted, *ceſſavit* could be no bar againſt it. That at leaſt they ſhould have made ſuch a denial, as to alledge that the records contradicted ſuch right; otherwiſe, that it ſhould be taken at preſent that they ſupported it.

Motion ordered to be adjourned, to ſee whether the parties would bring it on without information. —*

Davis againſt Morrifon.

Action of Trover.

ONE *Deeds* bought plate of the defendant, and gave Pawnbroker him a draft on a banker. The defendant *Morrifon* er, not knowing goods to have been unlawfully obtained by deceit, not liable to answer. Of brokers, that they ſhall be ſworn, vide 13 E. 1. ſt. 5. in Ruſſhead's Appendix. Sale to a pawnbroker not to alter the property in London, vide 1. J. 1. c. 21. their fees, 21 J. 1. c. 17. ſ. 3, 31 Ann. ſt. 2. c. 16. ſ. 2. Not to buy and ſell bullion, 6 & 7 W. 3. c. 17. ſ. 7. Stockbrokers, 8 & 9 W. 3. c. 20. ſ. 60. Not to extend to carrying on any home or foreign trade or partnership, except as to inſurance, vide 6 G. 1. c. 18. ſ. 25. Exception in favour of the South Sea Company, 6 G. 1. c. 18. ſ. 24. 27. Eaſt India Company, 6 G. 1. c. 18. ſ. 28. Reſtraints and penalties on ſtock jobbing, 7. G. 2. c. 8. To enter all their contracts, 7 G. 2. c. 8. ſ. 9. Penalty on retailers of ſpirits taking pledges, 24 G. 2. c. 40. ſ. 12. vide alſo 30 G. 2. 24. 32 G. 2. c. 24. ſ. 2.

Q

gave

* Quilibet præſumitur optime pro ſua cauſa dicere.
Stabitur præſumptioni donec probetur in contrarium.

gave a receipt on this draft as for cash. *Deeds* pawned the plate to the plaintiff, a pawnbroker, shewing him this receipt given by the defendant, as evidence of his property; on which *Davis* took the goods in pawn. The draft was a bad one; for *Deeds* had no money with the banker on whom he drew. *Deeds* was tried on an indictment on the 30 G. 2. preferred by *Morrison*, for procuring, under false pretences — *Davis* procured the goods on the trial, to convict *Deeds* — *Morrison* seized and kept the goods. *Davis* on this brought an action of *trover*. The jury at *Guildhall* found a special verdict, subject to the opinion of the court.

Mr. *Beaumont*—The statute of *James* has a very long preamble complaining against a new set of brokers.

Then *s. 4.* recites, that no kind of goods that are stolen, or robbed, or *badly* or unlawfully purloined or *come by*, but these take them in pawn; therefore, for the avoiding of the said mischiefs and inconveniencies, thefts, robberies, felonies and *bad* people; then it proceeds to enact, that no property shall be changed in goods wrongfully or unjustly purloined, taken, robbed or stolen.

It is observable, that acts of parliament, in describing felonies generally, use the word *feloniously*, as in an indictment; now here, though they describe a felony, they purposely avoid the word *feloniously*; distinguishing, I think, clear between *unlawfully come by*, or *purloined*, in a manner not subject to an indictment; and such as are *feloniously come by*. The *stat. 34. G. 2.* says, to be sure only of goods, when the pawnbroker *knows them* to have been fraudulently obtained: But, I think, that by the *Statute of James*, whether the pawnbroker *knows* the fraud or *not*, no property vests. And I think it is of great consequence to the public, to have the statute so construed. Mr. *Beaumont* particularly urged, that *Davis* had never any property in the plate; it having come to his hands against the right of the owner, in whom he contended the property always remained; and, therefore, that an action of *trover* was not maintainable. And he cited 6 *Mod.* 114. that goods obtained by fraud were *no* property. [But *note*, this was as between the parties, and not as a third person.]

It was contended for the pawnbroker, that it was necessary by the *statute of James*, that the taking should be *feloniously*, *vi & armis*; that Mr. *Morrison* gave credit here to *Deeds* on the draft, as for cash. He did not question whether he had cash at the banker's; but gives credit to the draft as cash: Therefore the defendant *Morrison* having

endorsed the bill of parcels, acknowledging the receipt, accepting the draft as cash, is not at liberty to take advantage. Mr. *Davis* accepted the draft on Mr. *Morrison's* credit as payment. Mr. *Morrison* has no right to say *Deeds* came fraudulently to the goods by false pretences, and, therefore, [187] no property vested. *Davis* contributed to convict *Deeds*, and this ought not to be turned by the defendant to his prejudice.

Lord *Mansfield*—The case is admitted by Mr. *Bearcroft*, that it would be exceeding hard: If the *law*, however, will have it so, there is *no* remedy. But, I think, this case is *not* within the *statute of James*, which makes the property not vest against the *right* owner, as between *him* and the *taker*.

Here *Morrison* acquires to himself property, without the concurrence of the owner; he gives credit to a cheat: Who is to suffer? He, or a third innocent person?

Mr. Justice *Aston*—I think the statute is to be understood of a fraudulent, tortious, or surreptitious taking, without the concurrence of the owner. If the word *obtained* had been in the statute, I should have thought it clearer: But, as the evil is greatly encreased since the *statute of James*, I could wish the pawnbrokers took at their peril.

Mr. Justice *Asburst* much to the same effect as to the construction of the *statute of James*.

Bail.

A Person offered as bail, was described in the notice as an hatter; on exception taken to the notice he appeared to be a servant to an hatter, hired for a year. He lived in a separate house—the court rejected him.

Bail described as hatter, being servant to an hatter, rejected.

Notice of Bail, with the Sur-Name omitted.

THE court gave them leave to take two days time to justify.

Sur-name omitted; time to justify.

Zoffani against Jennings.

ON a rule to shew cause, why, on payment of costs to the master, the trial of the cause between the parties should not be put off till next term.

Affidavit
that major
Bruce is a
material
evidence,
and that he

Affidavit on which the rule was moved, was, that Major *Bruce* is a material evidence to the defendant; and that he is major of such a regiment, which regiment is now at the *Grenades*.

is major of such a regiment, and that the regiment is at the *Grenades*, held not sufficient to put off the trial; but it might have done if the cause had appeared to have merits.

[188] Objected—that the major himself is not said to be at the *Grenades*, but only his regiment.

Lord *Mansfield*—There is certainly a flaw in this affidavit, if he does not swear that Major *Bruce*, but his regiment, is at the *Grenades*. I would not have gone upon this *subdly*, if there had been merits.

DISCHARGE THE RULE.

Harrington *against* Jennings.

COMPLAINT against an attorney for not acting according to his duty as such, in forwarding the plaintiff's business; and, that he did not proceed against the original debtor, but admitted of one Mr. *Hughes* undertaking, *per quod amisit*, her debt.

It was a debt on a respondential bond.

It was said, that the attorney had favoured the original debtor unduly.

Besides, that he was not at liberty to act out of the general course, and contrary to the authority given; and then to say he had done for the best.

That he does not say he explained the nature of the proceedings to his client; or gave her to understand she was made to give up the benefit against the original debtor, and rely on the other singly.

That it is true, she consented in general terms, not understanding the nature of the business—she said it would be very agreeable to her to have her money; but this was not giving an authority to *lose* her money for her.

That the attorney might have been sure, that *Hughes* was not solvent, or he would not have made himself responsible for a man in so bad circumstances, as the original debtor was known to be.

Mr. Justice *Aston*—The question is, Not whether *Jennings* shall be security for the bond, or, whether ultimately he shall be liable to an action; but whether there is ground to proceed originally against him *now*?

IF

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If he acted not intentionally ill, but with *good* design, though eventually unhappy, this is *no* ground to proceed *criminally* against an attorney.

First, as to the bond, when *B.* offered bail and said, [189]
“it’s no matter whether good bail, I am ready to pay you
“an handsome compliment.”—“No,” says *Jennings*, “I
“will not consent.” Then *Hughes*, whom he swears to
have taken for a good man, and whom I can’t say he has
sworn falsely in so swearing, offers to put in and perfect bail,
&c. A better offer one attorney could not make to another.

Then as to suspending the proceedings on the bail bond ;
it appears the worst part : But she *knew* and *approved* it, as
appears on her affidavit.

As to the promise about paying the money, she knew by
whom it was to be paid ; and *Jennings* seems to have thought
she would have the money.

However *imprudent* it may have been, it does not appear
to have been done *malo animo*.

As for *Hughes* having been discharged from the proceedings
on the attachment, it was done after she had discharged
Jennings from acting for her. As she may have her remedy
by *action*, if it should appear he knew *Hughes* not to
be solvent, which would be very bad ; the court will not
grant an *attachment* in a *doubtful* matter.

Mr. Justice *Ashurst*—The court will not grant an attachment
but on a *clear* case ; nor proceed *criminally*, where the
conduct of a party seems to have been *intended* for the best.
B. appears not to have been solvent ; and, besides, is since
dead : So that the plaintiff would have no remedy against
him. *Hughes* is living, does not appear insolvent ; so that
I don’t see but it may be better for the plaintiff.

Attachment will
not be
granted in
a doubtful
matter,
when the
party may
have his remedy by
action.

I am of opinion with my brothers, the rule ought to be
discharged.

RULE DISCHARGED.

ON a mandamus moved against the Commissioners of
Wavertree for not laying out public roads according to
the act of parliament.

Lord *Mansfield*—I don’t think we can supersede the adjudication
of the justices, unless manifestly unjust.

But, though the adjudication there is made final, yet [190]
when they come into this court, to have granted them a
prerogative-writ *for their assistance in the executing*, the court
will look into the justice.

A case

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A case was mentioned by his Lordship, in which, though in appeal from the Grand Sessions of *Wales*, their sentence had been affirmed by the House of Lords; yet when it came before the court of Chancery, the party having got out of the jurisdiction, Lord *Hardwicke* would not grant the assistance of the court without entering into the justice of the case; notwithstanding the judgment in the House of Lords.

Bail.

Rule of Practice.

Four days to put in bail, mean exclusive of the return.

FOUR days *exclusive* of the return-day to put in bail; and if the last is of a Sunday, then the whole of Monday. And within the four days, it's common to have a summons, to shew cause at a Judge's chamber, why there should not be an order of four days afterwards to put in bail.

Cochin against Heathcote.

Feme covert has a power of appointment by will or deed, she executes by both, and it does not appear which was prior, both were on the same day. By the deed she settles,

ON a case out of Chancery for the certificate of the judges.

Case stated, that *Mary*, the wife of *Dadley*, conveyed with her husband a considerable part of her estate in 1768 by deed—to the use of her husband and herself for life and the longer liver—then to her issue as tenants in common. And in case she and her husband should die without issue, then to be disposed of in such manner as by will or otherwise she should appoint, notwithstanding her coverture. This of her estate in *Nottingham*; of her' estate in *Cheshire* in like manner; except as to her power of disposal which is by will, not by deed.

on failure of issue of her and her husband, to such children of her sisters as shall be living at the death of her and her husband, or the longest liver, *habendum* to such children of her sisters as shall be living at her decease. The will devises to such children of her sisters as shall be living at her decease. A child born after her decease, and before her husband's. Question, Whether he could take? Determined—that if the deed was first there being no power of revocation given; therefore the will, *quo ad hoc*, would be no effect; if the will was first, it being revocable in it's nature, was revoked by the deed, if the deed was contrary: That the whole, therefore, would turn upon the effect of the deed; and that by the deed, the child of the sister took; the office of the *learned* being to ascertain the quantity and quality of the estate, and not to destroy the premis

Th

Then she settles among such children of her sisters *Per-* [191]
Enson and *Heathcote* as shall be living at the decease of *her*
and her husband; *habendum*, to such children as aforesaid, as
shall be living after her *own* decease.

This will was made at the same time as the deed, by which
she gives to all such children of her sisters as aforesaid, as
shall be living at *her* decease.

She died in 1770; her husband in 1771. *Godfrey Heath-*
cote, son of her sister *Heathcote*, named in the deed and will,
was born *after* the death of Mrs. *Doddsley*, but *before* the death
of the husband.

Contended—that the will could have no effect; that the
whole operated by deed; that a jury would be very much
inclined to *Godfrey Heathcote* (who was born of Mrs. *Dodds-*
ley's sister ten months and two days after Mrs. *Doddsley's*
death.) Infant in *ventre sa mère*, living even before her de-
cease, the time limited in the *habendum*, but that *this* con-
struction was not desired of the court; but only that the
will could not be good; and the deed, which she was per-
mitted to make, being not a deed, with power of revoca-
tion, but absolute; therefore, that having only executed
her power by deed, she could afterwards execute it to ano-
ther effect by will. That in the deed she gave to children
living after the decease of *her and her husband*, or the longest
liver; and the *habendum*, to children living at her death.
That it is the rule of law, that the *habendum* cannot limit
to other persons than those named in the *premisses*, or in a
manner *contradictory* to the *premisses*. That, however, it
might happen, either by error in the transcriber, or ap-
prehension she should out live her husband; she *has*
made the *habendum* plainly *repugnant* to the *premisses*, and
destructive of them.

On the other side Mr. *Wallace*—That Lord *Coke* says, if a Co Lit.
man gives to *A.* and *B.* in the *premisses*, *habendum* a moiety 183.
to one, and a moiety to the other, that the *habendum*
makes them tenants in common, and only explains the
deed.

That Sir *Thomas Jones* states a variety of instances, where
an *habendum* may enlarge, abridge, or explain.

That it ought not to be objected to her, that she has made
two instruments, a will and a deed, that her intention might
take effect, by one or the other: Much less should an intent
which she has so guarded by both, be disappointed.

That

192] That in the will, which, if nothing else, is an explanatory instrument, she gives to all such children [of her sister] as shall be living at her decease.

The conditions in the deed affect such children as shall be living at her death; therefore, if the child of her sister born after her death, should take, he would take, without being subject to the condition.

Lord Mansfield—This is too plain a case. If the deed was before the will, there is no power of revocation; if after, the deed revokes the will. It is a deed of appointment of uses, and therefore liberally to be construed. It seems plain, that she vests the interest to such as shall be living at the time of the death of the longest liver of her or her husband: And the condition to be performed by such as shall be living at the time of the death of the survivor, makes it very clear. In comes a blunder by the scrivener: It's plain it was a blunder. The office of an *habendum* is to ascertain the quality and quantity of the estate, and therefore in the case of Mr. Wallace, of an estate to two; *habendum* to the one, for life; remainder to the other, in tail, the *habendum* only ascertains and fixes the meaning of the premises, but does not contradict or destroy them; but a gift to A. and B. in the premises, *habendum* to A. only, was, I believe, never heard of. All the *habendum* could operate here, was to make them tenants in common, instead of joint-tenants: Therefore, as the will is of no effect, and the condition must be applied to the intent of the deed, that Godfrey Heathcote [the sister's son] took, is clear.

Bail.

JEW Bail excepted against. He came to justify for 600l. He said he was a merchant, and a Jew; that he rented an house of 10l. *per annum*; that he was worth a great deal more than he came to justify for. He was asked, whether he carried a box about the country; he said he did, but that he was worth a great deal more in the warehouse way; that he never carried goods to less amount than 500l. He was bail in another action or two of some amount.

Court thought him good bail.

Under-

Undertaking.

AN attorney undertook to enter a common appearance; but, though he wrote the undertaking, he did not sign it, but immediately retracted.

The court was applied to for an attachment, but dis- [193] charged the rule, thinking the undertaking not so complete as to hinder it's being retracted.

Costs.

ON a question, on assignment of bail bond, by judges order, assignment held good; but there was a litigation about costs, of eight or nine shillings, as to which the court would not grant the rule.*

Inquisition.

ON a motion to set aside a writ of enquiry for irregularity.

The complaint was, that whereas notice had been given to execute the writ before the sheriff, at *Guildhall*, at such a day and hour, the plaintiff had procured it to be executed an hour before: And that the defendant does not believe the plaintiff can make out his demand, according to the sum in the writ executed. That the notice was of a writ of enquiry, to be executed between ten and twelve in the forenoon; that he attended, by counsel, *before eleven*, and waited till past twelve: That the writ of enquiry had been executed *ex parte* only, at ten, as he was informed and believes.

On the other side, that the clerk of the defendant's attorney had been applied to, to know whether the defendant meant to attend by counsel, or no; that he said, he did not know: That then he was desired to say, they should execute the writ of enquiry between ten and eleven, as near eleven as might be, unless by a line he was informed that some other time would be more convenient to the counsel who sent. That not receiving such a note, they met about a quarter before eleven, pursuant to the notice; that the jury did not execute the writ till after eleven: That they had found an average value.

Mr.

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Mr. Justice *Aston* observed, that the affidavit was crammed with a vast quantity of unnecessary matter, by which they seemed disposed to crowd two motions together: And that they either came to set aside for irregularity, with costs, or else to be let in on costs, to plead the merits. That they had better confine themselves to the former: That as to the value, that was supposed proved in evidence.

[194] Mr. *Wallace* said, the party attended five minutes before eleven, being told they meant to execute as near eleven as might be.

The mischief of superfluous and irrelevant affidavits.

Mr. Justice *Aston* observed, they had made their case *great deal the worse* by admitting an *heap* of affidavits much superfluous; in great part *insignificant*; and in some *false*. That, however, though it did not seem they could have much to say in the matter, yet that since a gentleman attended, with a serious intention of speaking to the case, he would not take it out of their power.

Rule.

And therefore, on payment of costs of the writ, and also of the motion, let the WRIT be set aside, on their consenting, not to bring a writ of error. The writ of enquiry to be executed on Monday next; and, I think, you will take care to be time enough.*

Bail.

PARISH of St. *James, Clerkenwell*, without saying in what street, too large notice. However, he being present in court, they agreed to admit him.

Bail.

NOT knowing how many actions he was bail in, or for what sums, REJECTED.

Covenant.

COVENANT on articles to be the plaintiff's hired servant for one year and a quarter, and to pay at the expiration of the term, 200. Defendant covenants that he would afterwards, at the expiration of the term, surrender his trade and business, as a silk mercer, to *J. Preston*, the plaintiff's nephew, or such other as the plaintiff should appoint.

Other

* *Res contra legem acta pro infecta habetur.*

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Other covenants with a *penal sum* of a thousand pounds.

Breach assigned, that the defendant *did not surrender* at the expiration of the term to *John Preston*, the plaintiff's nephew, or any other person appointed.

To which the defendant pleaded seven different counts, [195] five of which were at issue at bar *en pais*; two were on demurrer, upon which this case was argued, the principal was, that the plaintiff did not find sufficient security for the payment of the sum stipulated.

Against this it was argued, that by the case 2 Mod. 309, reciprocal covenants cannot be pleaded in bar one against another. Condition that defendants should give such release as the judge of the Prerogative court should think fit. Plea, that the judge did not appoint any release, held not good; because he ought to have tendered it to the judge. Because there is no covenant on the part of the judge; but where mutual covenants otherwise.

1 Lord Raymond, 124 Covenant that *Squire* should assign to defendant his interest in an house, &c. and defendant pay 30l. Plaintiff assigned for breach, that defendant did not pay. Defendant pleaded that *Squire* did not assign. Plaintiff demurs. Adjudged for him; because mutual and independent covenants: And the parties might have reciprocal actions; and that therefore the plaintiff might bring his action before assignment of the house: And if he did not assign, defendant might have his remedy.

Vide 33 H.
6. 13. 4 H.
7. 4.

French ex-
ecutor of
Squire v.
Trewin.

That in Sanders, 319 Debt on specialty. Plaintiff declared, on agreement produced in court, *nempe*, that defendant should give to plaintiff the sum of 775l. for certain lands and messuages therein stated. Five shillings earnest paid: And that defendant should pay the residue a week after the feast of *St. John the Baptist* next ensuing. Breach assigned, that notwithstanding defendant had paid the five shillings, parcel of the sum above-mentioned, he had not paid the residue, though often thereunto required, to the plaintiff's damage. The defendant prayed *oyer* of the deed, which was read him. *In hac verba*, to wit, 11 May, 1668, it is agreed upon by doctor *John Pordage*, and *Basset Cole*, Esq; *et quæ sequuntur*. On *oyer* the defendant demurred on several points: And *inter alia* the grand exception was, that the plaintiff, in his declaration, has not averred that he conveyed the lands, or at least, that he tendered a conveyance; and that the defendant hath no remedy to obtain the lands, and therefore that the plaintiff could not support his action, not having conveyed or tendered. But the court held, that both

Pordage v.
Cole, Hil.
20 & 21
Car. 2.

both were to be taken as parties to the conveyance; and if the plaintiff did not convey, defendant had an action of covenant against him. And thus, that *each party* had *mutual* remedy against the other.

P. 535.
Mic. 8 G.
rot. 212.

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Sir John Strange's Reports, that in Blackwell v. Nash, plaintiff covenants to transfer stock, and defendant to pay for it. Plaintiff pleads, that he was ready at the day, &c. to transfer, but that the defendant refused to accept or pay. On demurrer, contended that this was a *condition precedent*, and the words to pay *for it* shewed so: And therefore, that the plaintiff should have shewn that he *did perform* the condition on his part by *actual* transfer. Contended on the other hand, that the covenants were *mutual*. *Per curiam*, That the consideration was a *covenant to transfer*, and not *actual* transfer; though if it had, *tender* and refusal would have been a *performance*. Affirmed in the Exchequer chamber.

That in Dawson against Myer, on error in the Exchequer, from a judgment of the King's Bench, it is reported by Str. 712, that the plaintiff declared an action of covenant, that in consideration of 738l. 10s. he covenanted to transfer the produce of 634l. in lottery annuities, subscribed by the plaintiff, and defendant covenanted to accept and pay. Plaintiff sets forth *tender*, and that defendant *refused*. Demurrer to the plea of tender: And on this demurrer the court gave judgment for the plaintiff; for that they were *mutual distinct* covenants. And that the covenants being *mutual*, the *tender* was to be laid out of the case, and plaintiff not obliged to answer to it.* And on the trial in error, Eyre, chief justice of the Common Pleas, Gilbert chief baron, and four of the other judges, were unanimously of opinion, that the judgment of B. R. was right, and *affirmed* it accordingly. And the case was held so clear for the plaintiff, on the first opening, that there was no argument. And on error in parliament, the plaintiff submitted, without bringing it to an argument, and paid the money.

It was farther argued by Mr. Buller, in the principal case before the court, that there was an authority that *one* breach of covenant could not be set off against *another*, because the damages might not be equal.

Covenant to do an act at a particular time, as in the case of Fletcher, *anno octavo* of his present Majesty, in *Hilary* term,

* Lex non cogit ad supervacua.

Idem est nil dicere ac insufficienter dicere.

term, there Mr. Justice *Vates* said, the covenant is to do a thing before a particular day, and that is one characteristic of mutual covenants.

Here, too, if one covenant must be performed, all the covenants, which are many, must be performed, before the plaintiff can be entitled to his action.

Secondly, which, I think, was the point in demurrer, Mr. *Buller* urged, that even if these should not be thought mutual, but dependant contracts, he hoped the judgment of the court in favour of his client; because the act assigned in breach of covenant not to have * been done, was to be dependant, if the contracts were not mutual, on a precedent act to be performed by the defendant, before the plaintiff was to perform his covenant.

That if the covenants were not mutual, the condition precedent lay on the part of the defendant, to have been performed by him.

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For that after the year and a quarter's notice, it was agreed, that the defendant should yield up his trade to the plaintiff. That then the partnership should be entered into between the plaintiff and such person as the defendant should appoint: That then the sum agreed on should be paid as before.

On the other side, it was argued, that the condition to be performed by the defendant was dependant; that the plaintiff had not performed his, and therefore was not entitled. That the defendant was a person in considerable trade; that he had entertained thoughts of putting his nephew into the shop, after paying off the moiety of the stock. That he looked out for a person; that a journeyman weaver was recommended; that he took him into his shop, to try him as a servant, it's said; and he was to take him into the shop. It's true, *after* the execution of the articles of partnership; that immediately *from* and after the execution of the articles of partnership, the defendant should permit the plaintiff and *John Preston*, or other person appointed, to enter, &c.

That the articles were to be first executed, and plaintiff find sufficient security.

Farther, that the security of 250l. by monthly payments, was a *precedent* condition to be performed, the defendant not relying on the responsibility.

If it were construed, that it is an independent and mutual covenant, Mr. *Preston*, the defendant, would be obliged to rely on the personal credit and security of the plaintiff, contrary to his own plain intention, and that of the drawer of the articles.

That to construe an independent mutual covenant, would be against

the meaning, equity, and faith of the agreement; because the defendant would be obliged to rely on a personal security, on which by the terms of his agreement, he had declared he did not choose to rely.

That

That at the year and quarter expired, the plaintiff at that time, and at the house which was to have been entered, should have tendered the security on which the house was to be entered. That on the other side, the learned gentleman who drew the declaration had thereon declared, he had tendered the security, but that the security, as was the fact, would not execute. He would not have stated this, if the *tender* of the security were not necessary, as a *precedent* condition. And therefore Mr. *Preston*, on the security refusing to execute, by reason of non-performance of the condition on the part of the plaintiff, was not bound to his. And therefore prayed judgment.

In replica-
tion.

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Mr. *Buller*—That though he believed the defendant would do himself as much service as he could, they could judge of his intention only by his deed. They have covenanted to do distinct acts of a mutual nature. If the court construes it an independent covenant, the plaintiff owing only 100l. shall not recover against the defendant, in case he owed a thousand.

Lord *Mansfield*—This case has been *extremely well* argued on *both* sides; and the *consequence is*, the court forms a *clear* opinion.

Indepen-
dent cove-
nants.
Covenants
conditional.

The *rule of law*, to be sure is, that covenants *independent* cannot be *set off* one against the other. There is *another* sort of covenants, which are, in their nature, *conditions*; and *he* who is to perform the *first* condition, *cannot* have his action till he *has* performed.

Covenants
reciprocal.

There are also covenants *reciprocal*: * such are *all purchases*; in which, if the seller is ready, *tendering* the conveyance, and the buyer is not ready to *pay* the money, *then* the seller shall *not pass* his estate without.

It would be the *most monstrous* case in the world, if the argument on the side of Mr. *Buller's* client was to prevail. It's of the very *essence* of the agreement, that the defendant will not *trust* the *personal* security of the plaintiff. A *court of justice* is to say, that by operation of law he shall, *against his teeth*. He is to let him into his house to squander every thing there, without *any* thing to *rely* on, but what he has *absolutely refused* to trust. This payment, therefore, was a *precedent* condition before the covenant of putting into possession was to be performed on the part of the defendant. †

Mr

* Pacta reciproca vel utrumque ligant vel neutrum.

† Conditio precedens infecta alteram partem solvit.

Mr. Justice *Aston*—There is a transposition in the articles, which are *ill* marshalled. This is a mutual and independent covenant to be performed by the plaintiff antecedent to any thing done on the part of the defendant; and this being the intent and legal construction, the law will so marshal the words, as to give it this effect. †

The law will marshal words to their true effect.

Mr. Justice *Asphurst*—Whether a condition be precedent or not, I think is always to be determined by the *nature* of the transaction, and the *meaning* of the parties. The tendering of the security was to be *precedent* to the assigning of the stock, and entering into the articles of co-partnership. And *this* could not have *hurt* the plaintiff, who could *never* have been made *liable* to the *payment*, if the stock were not assigned, nor possession delivered.

Condition precedent, or not, is to be determined by the nature of the transaction.

JUDGMENT FOR THE DEFENDANT.

ON a motion for an information to shew cause, why a [199] turnpike should not be set up again, which had been taken down at a meeting of twelve of the commissioners; on suggestion of irregularity in the time and manner of meeting.

The court said all the twelve should have been moved against; for, if any were criminal, all were equally so; but that it did not seem there was any ground for an extraordinary criminal information.

Rule refused.

The King *against* Villers.

INFORMATION on the statute 22 Geo. 2. against importing foreign embroidery, to recover 100l. penalty on a special case; which finds, that the defendant imported the foreign embroidery made up into wearing apparel, with him in his portmanteau, and after his landing it was seized.

Vide 4 Ed. 4. c. 1. anno 1463.

3 Edw. 4. c. 4. an act mentioning certain merchandize, not lawful to be brought into this realm; recites the great mischief to several artificers by divers articles manufactured by strangers, enemies, &c. against good laws, &c.

22 Ed. 4. c. 3. a temporary act continued by the statute 1 R. 3. c. 10. tantamount to the former, for ten years.

Act 5 Eliz. c. 7. increasing the penalties.

13 & 14 Car. 2. c. 13.

22 Geo.

† Lex verba male collocata ad mentem et legitimum sensum instruit.

Easter Term, 13 Geo. 3. K. B.

22 Geo. 2. c. 36. intituled, An act for the prohibiting the importing and wearing of foreign embroidery—recites the great sums expended.

Enacts, no embroidery to be imported; forfeiture of such embroidery as shall be imported.

Penalty of 100l. on the importer.

Lord Mansfield. Mr. *Morgan* enumerating the evil, Lord *Mansfield* said, these were rather to the jury: The court was to construe the act.

[200] Mr. *Morgan* proceeded to observe, that the jury had found against Lord *Villers*, the defendant, as the importer; that the plaintiff had declared against him as such; that this being a remedial statute, the court was concerned as much as possible to suppress the mischief, and advance the remedy: That Lord *Villers* had owned his having brought a vast quantity. That his wearing in a foreign country some of the clothes, would not exempt him from the statute.

On the other side, that the jury had not found Lord *Villers* an importer, but had found specially that the 3d and 22d of *Edw. 4. 5 Eliz.* only enacted a forfeiture of the cloaths, and other manufactures prohibited.

13 & 14 C. 2. recites nearly as the act in question: The act carries an idea of it's being brought and imported for sale, and not a syllable of them worn; forfeiture, therefore, enacted of such parcels, &c. Forfeiture of 50l. to the seller. 22 G. 2. enacts a forfeiture of the garment, but exempts the wearer from the penalty.

3d of his present Majesty against the importation of ribbons.

c. 28.

6th of his present Majesty against importing foreign silks and velvets.

The 3d of his present Majesty provides, that it shall not be construed to extend to such as shall be worn as part of wearing apparel.

The 6th provides according to the 22d of his [late] Majesty: That, therefore, the defendant having these cloaths made up as wearing apparel, though not actually, perhaps, worn, is not liable to the penalty. Mr. *Davenport*.

Replication to Mr. *Davenport*—The words of 22 G. 2. speak of bringing over before: Whether before the act of 22 G. 2. garments were seizable, I will not contend, as Sir *Joseph Mawbey* did when he mixed the wheat and barley.

The

Easter Term, 13 Geo. 3. K. B.

The case of avoiding the penalty by procuring foreign embroidery to be worn a day only by the importer on his voyage.

No difference between bringing over and importing.

Lord Mansfield—I think I must take it for granted this never has been a case before the present, in which the wearer is made liable to the penalty as importer: It must depend on the words of the statute. There were need of [201] very strong words to make a gentleman, wearing foreign clothes, not only liable to be *stript*, but also, the instant he sets foot on *English* ground, to the forfeiture of 100l.

The statute 22 G. 2. recites, where great quantities of gold and silver thread lace, *French* and brocade are brought over for sale, whereby great sums of money have been expended and carried out of the kingdom; and whereas several statutes have been enacted, prohibiting the sale—therefore, the legislature considers particularly and solemnly, as to the 100l. forfeiture, importation in the way of merchandise. Accordingly tailors and milleners are made specially liable to a penalty: Because they can have them only in the way of trade.

Suppose a foreign *ambassador* comes over; is he and his attendants within the penalty, for only having a gold button on their coat?

Suppose a *stranger*, entirely ignorant of our native laws, comes in the cloaths of his own country; are we to catch every *stranger* likewise who shall come among us?

It is remarkable too, that the statute 22 G. 2. particularly mentions gold and silver thread lace, *French* and brocade; all of which, except the last, are manufactures brought over separate, to be affixed to the garment here. It remained, therefore, to be questioned, whether the garment was liable, if they were brought over worked into it? And the legislature seemed to have a doubt, which I will not say was groundless, whether the gold and silver lace, &c. so worked, was seizable. However, as to the seizure, the statute particularly provided; but not as to the penalty when worked into wearing apparel: But the wearer is particularly excepted, as has been before observed. Lord Villers might as well have had these cloaths on his back, as in his portmanteau.

JUDGMENT FOR THE DEFENDANT.

R

Distress.

Distress.

ON the statute of Distresses, 27 G. 2. providing for re-payment of surplus on demand; suing out a writ, it was contended, is not demand, for you should make your demand before you commence your action.

Anno salu-
tis 1225.

Of distress, that none shall be distrained for more than is due. See Magna Charta, 9 H. 3. c. 10.

Anno 1266.

[202]

Distress not to be outrageous, nor of plough cattle. Vide 51 H. 3. stat. 4.

Called articuli cleri,

• Anno

1315

Commonly

called 1

West. anno

1275.

None to distrain for amends of injury, without award of court. Vide statute *Marlebridge*, 52 H. 3. c. 1. Nor out of his fee, c. 2. Nor in the highway, saving the king, c. 15. Nor in the ancient fees of the church. Vide 9 Ed. 2. stat. 1. c. 9. *

Distresses not to be driven out of the country, and to be reasonable on pain of ransom. Vide 52 H. 3. c. 4. 3 Ed. 1. c. 16. 1 & 2 Ph. & M. c. 12.

Freeholder not to be distrained to answer of his freehold. Statute of *Marlebridge*, c. 22.

None to be distrained for another's debt. Vide 3 Ed. 1. c. 23.

The cattle of the plough not to be taken for the king's debt, if others can be found, 28 Ed. 1. c. 12. To be driven to a pound within three miles, vide 1 & 2 Ph. & M. c. 12.

Sheriffs to have four deputies to make replevin. *Ibidem*, f. 3.

Anno 1665. If first distress not sufficient, it may be repeated. 17 Car. 2. c. 7. f. 4.

That goods distrained for rent may be sold, if rent not paid within a reasonable time. Vide 2 W. & M. c. 5.

Corn and straw loose, vide f. 3. Double damages for wrongful distress, vide f. 5.

Not to be taken in execution, without paying the arrears of rent to landlords. Vide 8 Ann. c. 14.

Goods removed, distrainable within five days. 8 Ann. c. 14. f. 2.

Within thirty days. 11 G. 2. c. 19.

That arrears may be distrained after lease determined. Vide 8 Ann. c. 14. f. 6.

Penalty of double value on fraudulent removing. 11 Geo. 2. c. 19. f. 3.

Cattle

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Cattle on the common, and crops growing, distrainable for rent. Vide *ibid.* f. 8.

Distresses may be secured and sold on the premises. Sec. [203]

10.

In case of distress for rent, irregularity not to make it void. Vide *sec.* 19.

Amends may be tendered. Vide 19 & 20.

General issue, 21.

Pounding in *Scotland.* 20 G. 2. c. 43. f. 23. anno. 1747.

Justices in warrants of distress for penalty, to limit the time for sale of the distress. Vide 27 G. 2. c. 20. and the statutes there referred to in Mr. *Ruffhead's* edition.

Distresses must be of things of a valuable property: Dogs, bucks, does, and other animals *fera natura*, cannot be distrained. Even valuable property cannot be distrained, when in actual present use, as an horse, when a man or woman is riding on him; an ax in a man's hand cutting wood.

Thirdly, Things for the maintenance of trades for the benefit of the commonwealth, and there by the authority of law. As an horse at a smith's shop, not to be distrained for rent out of the shop; materials in a weaver's shop; cloth of customers at a taylor's; sacks at a mill or market.

Fourth, Nor a thing distrained already; for it is in the custody of the law: Nothing at common law should be distrained, which could not be rendered in as good plight as when taken; but this is altered as to corn, by 2 *W. & M.* c. 5. but, I apprehend, it still holds as to dead poultry, dead fish, and the like.

Fifthly, Nor beasts of the plough, (nor utensils of profession, as the axe of a carpenter, or the books of a scholar) while there are other distrainable goods. *Co. Inst. c.* 7. f. 51.

Nor shall distress be taken for uncertain services. *Co. Inst. lib. 1. f.* 136. vide also *Burn's Justice*, tit. *Distress*.

A distress for rent cannot be in the night. 1 *Inst. l.* 2. c. 12. f. 213.

Nor could a man, by common law, break open doors to take it.

A man cannot work or use cattle distrained, but for the benefit of the owner. Vide *Wood's Inst. b. 2. c. 2. p.* 146.

By 7 *Ann. c.* 12. the goods of an ambassador, or other public minister shall not be distrained; if they are, the distress is void. [204]

If cattle are put into a pound overt, the owner must feed them; and, if they die for want of food, there is no remedy

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against the distrainer, but he may distrain again. And it is very remarkable, that though the divine law given to *Moses* provided for the case of a bird with her young ones, for the ox treading out the corn, for the beast of one's enemy fallen in the way; though the *Athenians* even punished with death the cruelty of a young man in putting out the eyes of quails for his sport, yet, our law does not punish any, the most inhuman treatment of a beast, otherwise than as it may occasion damage to the owner, * or danger immediate to the public, as by over-driving oxen, or the like: But the owner may use his own animal with what savageness he pleases; and the Law of *England*, which is a law of mercy, yet (as it has been complained somewhere before) hinders him not. Yet, I question whether, if an owner of any animal were to commit an act of wanton and extreme cruelty on it in public, or in the presence of any entreating him not, whether he would not be liable to an indictment at common law, as guilty of a nuisance. For mens eyes and ears are not to be offended with outrages on humanity; nor an example of cruelty to be set: And whatever is against common morality, and committed publicly, I conceive is within the common law of *England*, vide *Jones and Randall infra*. This kind of digression, I hope, is excusable, as the doctrine of distresses naturally led to it; by that part of it which permits cattle to be starved in the pound, if the person from whom they were distrained, does not come to feed them.

With respect to surplus in the case above, the court was of opinion that the statute of 27 G. 2. was not to be interpreted, negatively, that the money is not to be restored, unless on demand; but imperatively, that it shall be restored on demand.

Rice against Denton.

CUSTOM house officer on the 15 G. 2. c. 25.

Question, Whether the defendant had a right to regauge a cask of rum before he granted a permit. The act says, the merchant may land without payment of duty, on the terms of lodging it in a warehouse, &c. that the duty shall be in proportion to the gauge taken upon landing.

There is the excise gauger, the custom-house gauger, and the city gauger; which last is a kind of mediator between the other two.

Contended

* Vide 37 H. 8. c. 6.
2 G. 1. c. 22.
31 G. 2. c. 42.
vide the several Game Acts, and the Dog Act.

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Contended, that the officer should deliver up immediately, without second gauging.

On the part of the defendant—That the statute of C. 2. enacted the duty before landing; that in order to remedy this inconvenience, the statute 15 G. 2. allows them to lodge rums of the produce of the *West Indies* in warehouses to be approved by the custom-house officers: On producing the certificate from the collector, the officer is to grant a permit. The provision is, that he shall deliver the rum in such quantity as is expressed in the certificate. Question, Whether the gauging always so conclusive, that the officer shall never be at liberty to regauge. That though the statute seemed to think, that the same quantity would always continue, badness of the cask, and a thousand other circumstances, would exceedingly alter the quantity. The crown having enlarged the time for payment of the duty, first to six months, and afterwards to twelve months, favourably to the owners, if there be any loss, it ought to be to the proprietor, and not to the crown; that the certificate, therefore, from the collector, is to be the measure of the duty. If any loss, the proprietor must abide it, and not have quantity delivered which is not there, being lost. That it was intended the officer should know what he was to grant the permit for, and that multitudes of frauds must arise, if he has not that right.

Vide allowance for waste, 22 & 23 C. 2. c. 5. s. 3.

On the other side it was contended, in reply, that no fraud from the time of the statute to this had happened, for want of such a power to regauge. That he is merely intrusted with the charge of keeping, and the care of the warehouse, and has no discretionary power as to the permit.

Lord *Mansfield*—I do not know, as it may be necessary, perhaps, to apply to parliament, whether you ought not to do it as soon as possible. * It does not appear by the custom interpreting the act till 1772, nor by any act in being. It's apparent where the fraud is: *Smuggled or adulterated goods* may be brought in, to the injury of the revenue.

Ale not to be mixed after gauge taken, vide 22 & 23 C. 2. c. 5. s. 11. 7 W. 3. c. 30.

JUDGMENT FOR THE PLAINTIFF.

OF excise laws, see 12 Car. 2. c. 23. the beer and ale [206]
excise granted to King *Charles* for life. 1 G. 3. s. 1. Anno 1660.
c. 1.

Duties on foreign liquors to be paid by importer, vide 12 Car. 2. c. 23. s. 14. 15 Car. 2. c. 11 s. 17. 22 & 23 Car. 2. c. 5. s. 9..

Oaths

* *Judicis est jus dicere non dare.*

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Oaths of officers of the excise, 12 *Car. 2. c. 23. f. 33.*

Hereditary excise, 12 *Car. 2. c. 24. f. 15.* By this statute the duties were made payable by importers before landing.

Commissioners not to take excise to farm; penalty of bribing exciseman; exemption of colleges; directions for landings; where appellant shall have costs; excise offices to be kept in market-towns, vide 15 *Car. 2. c. 11. f. 2, 16, 21, 17, 19, 10.*

Vide Burn.
first vol.

Powers of commissioners given to farmers of the excise, 16 & 17 *Car. 2. c. 4.*

Additional excises expired, vide 22 & 23 *Car. 2. c. 5. 29 Car. 2. c. 2. 1 W. & M. c. 24. 2 W. & M. f. 2. c. 3. & c. 10. 3 W. & M. c. 1. 5 W. & M. c. 7. 7 & 8 W. 3. c. 30.*

Power to justices or commissioners to mitigate fines, 22 & 23 *Car. 2. c. 5. f. 8.*

Certioraries not allowed in proceedings on excise, *f. 14.*

Vide also, 1 *W. & M. f. 1. c. 24. 2 W. & M. c. 3. 4 W. & M. c. 3. 5 W. & M. c. 20. 4 An. c. 6.* Vide the act 1 *G. 1. c. 12.* for appropriating duties to the aggregate fund.

Vide r
Burn.

Powers and directions for preventing the concealment of liquors, and other frauds, 7 & 8 *W. 3. c. 30.* Vide 8 & 9 *W. 3. c. 19.* Vide 18 *G. 2. c. 26. f. 8.* Vide 10 *G. 3. c. 44.*

Weekly sum of 3700*l.* to be paid out of the excise revenue, as a fund, vide 12 & 13 *W. 3. c. 12.* made perpetual 6 *G. 1. c. 4.*

Commissioners and officers to be sworn, vide 10 *An. c. 19. f. 122. c. 26. f. 75.*

Penalty of obstructing an excise officer, 6 *G. 1. c. 27. f. 7.*

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Power by warrant to search houses, vide 11 *G. 1. c. 30. f. 2.* Vide rules for taking out permits, *f. 10.* Proof to be admitted of his authority, without producing his deputation, vide *f. 32.*

Directions on seizure of tea, coffee, &c. vide 12 *G. 1. c. 28.*

Three commissioners impowered to act, vide 1 *G. 2. c. 16. f. 4.*

Duty on sweets lessened, 10 *G. 2. c. 17.*

Punishment of persons going armed in defiance of excise laws, vide 19 *G. 2. c. 34. 11 G. 3. c. 51.*

Offences

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Offences against excise laws excepted out of general pardons, vide 20 G. 2. c. 52.

Summons left at offender's house to be deemed good notice, vide 32 G. 2. c. 17.

Power to seize forfeited vessels, 33 G. 2. c. 9. s. 16.

Additional excise, 1 G. 3. c. 7. s. 1.

Vide of other points relative to excise, 5 G. 3. c. 43.

Gresham college purchased for an excise-office, 8 G. 3. c. 32. For defraying the expence, vide 10 G. 3. c. 32. 12 G. 3. c. 46.

Feltham and others Churchwardens, against Terry, or Tyrrel, and others, Overseers.

Action of Trover against the Overseers, on the Case following.

A Churchwarden was convicted on the statute for neglect of duty; the overseers of the poor levied the penalty, and did not account for the surplus, nor apply to the use of the poor. Conviction quashed: The churchwardens brought an action for money had and received against the overseers; on which, upon a special case for the opinion of the court, the question was, whether, on the circumstances of this case, an action for money had and received would lie; or whether trover ought not to have been brought, or some other action of trespass?

Plaintiff may waive a tort, and bring an action purely of a civil nature, where it is for the benefit of the defendant.

Lord *Mansfield* delivered the judgment of the court to this effect, *May 8, 1773.*

We took this matter of the case of *Feltham* against *Terry* [208] and others into consideration. A churchwarden was guilty of neglect of duty, under the statute. On conviction before the justices of peace, the overseers of the poor levied the penalty, and there remained a surplus of twelve shillings; on the refunding of which we go. It appears, they did not account, nor apply to the use of the poor: The churchwardens brought an action for money had and received, against the overseers, the conviction being quashed. It was a *tort* therefore; and it has been said, that an action for the detainure simply, was not proper: For that an action of *trover*, or *trespass*, might have been brought.

However, we are clear that the party may waive the *tort*; which if he does, it is to his own prejudice, and in favour of the defendant. He cannot then come for damages; he cannot say, if the goods are sold, that they were double the value the defendant sold them for: *Here nothing can be recovered*

vered but what is conscientiously due; nothing but the real value; and the defendant loses no defence which he can make *bona fide*; whereas in an action of trespass, it would have been no legal justification to say, they acted *ex officio*.

Before Lord Hardwicke, *Cheeseborough and another against Moreson*, on an *indebitatus assumpsit*. Moreson received money of a bankrupt, as the price of goods the assignee came to recover. It was said, he cannot affirm and deny; alledge the contract, and avoid it.* The case of *Hope and Whip* was cited; which was, the defendant was indebted to one who died intestate; defendant took money secretly, something very like stealing it.† It was said, the administrator who sued in the name of the intestate, from whom the money was taken, could not bring an *indebitatus assumpsit*; but it was agreed, he might waive the tort. Lord chief Baron Parker said, in that case, that this action would lie in every case, but that of money won at play; and that it would by the assignee to recover money paid by a bankrupt. Mr. Justice Aston has a note of a judgment very ably given in the Common Pleas, which, for the sake of the Bar, I would desire him to cite.

Mr. Justice Aston—The case to which his Lordship alluded, and has desired me to cite, was *Hitchin and others, assignees of a bankrupt, against Campbell*. Judgment and execution on *indebitatus assumpsit*, against the banker, levied to the amount of 1500l. in 1769: The same year the bankrupt was found to have committed an act of bankruptcy. They sue the sheriff to recover the money levied. It appeared afterwards, that he had committed an act of bankruptcy in February, which was before the execution. Lord Chief Justice De Grey said, that the effect of a commission was to divest any estate out of the bankrupt; but before the commission the act of bankruptcy divested nothing. The sheriff taking the goods, no commission having issued, is no trespasser; but if he has them in possession, and has not sold the goods, an *indebitatus assumpsit* will lie.

Vezev, 326.

[In *Levins*, 1 part 142. *Elsbington v. Desbunt*, not guilty was held a good plea, on *indebitatus assumpsit*, which it would not have been, if nothing including in its nature a tort could be sued for by this action; and though the plaintiff waives the tort by bringing this action, yet the defendants

* *Allegans contraria non est audiendus.*

† *Ex maleficio non oritur contractus.*

[209]
Trover for
the lawful
coming by
and unlaw-
ful detainer.
An indebi-
tatus as-
sumpsit
held good
in the room
of trover.

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dants being permitted to plead not guilty, shews that it may be brought where denying of the *tort* is a sufficient denial of the action; because it is a denial that the plaintiff had any civil cause of action where the civil right depends on the *tort* committed.

That Lord *Raymond*, 742, *assumpsit* will lie for money paid by order of an illegal court.]

That in earlier cases, it appears this action has been adopted as a very beneficial one, by taking away wager of law. That it has been questioned, whether the purchasers under the bankrupt are liable; but they come in by his title: And whoever takes the money, *implies* a promise to do what is just.*

I think this action of the churchwardens is the *fairest*, and most *equitable* and *just* that can be.

POSTEA returned for the PLAINTIFF.

Of churchwardens, vide 3 *Car.* 1. c. 3. s. 2. 21 *J.* 1. c. 7. s. 5. and statutes relating to nonconformists, poor, &c.

A counsellor or attorney ought not be chosen churchwarden, and if he is, he may have a prohibition, by reason of his attendance on the courts of *Westminster*. [210]

Dissenting teachers, or persons in holy orders.

Other dissenters, not being teachers, may find substitutes.

Persons who have prosecuted a felon to conviction, exempted in that parish. Vide *Burns*, first vol, title *Churchwardens*.

Earl of Sandwich against Miller.

Scandalum Magnatum.

ON a motion on the part of the defendant, suggesting, that an impartial trial could not be had in the county of *Middlesex*, by reason of the high office, weight and influence of the plaintiff in that county, as a peer of the realm

A peer may lay his action of his scandalum magnatum, where he pleases: But on just ground of

suspicion, that there cannot be a fair trial, the venue shall be changed; otherwise not.

* Lex quemlibet fecisse præsumat quod lege fieri debuerat.

Note, There is a *nisi prius* case Lord *Raymond*, 742. *Meath v. Death* and *Pollard*, where it was held, that for money paid as costs, on order of removal, which order was after quashed, *indebitatus assumpsit* would not lie. But Lord *Raymond* seems to have doubted, and says, the money was paid by churchwardens and overseers both, and the action brought by the churchwardens only.

Note too, That in the part of Mr. Justice *Ashton*'s judgment, between these marks [] I am somewhat uncertain whether I have taken the very case cited.

realm, and first commissioner of the admiralty, and praying leave to change the *venue* from *Middlesex* to *London*, where the cause of action arose. The action was brought by Lord *Sandwich* against the defendant, as publisher of a libel, reflecting on him falsely.

Mr. *Wallace*, against the motion—That the plaintiff's being a peer of the realm, and first commissioner of the admiralty, was nothing to the jury of *Middlesex*, any more than to any other jury.

That the case of Lord *Shaftsbury* was very different, being on an indictment of conspiracy brought by him against certain persons, for falsely indicting him of high treason: And they alledged that he had great influence with the sheriffs. What influence has his Lordship with Mr. *Oliver* and Sir *Watkin Lewes*? That they alledged in that case, that the witnesses were afraid to come up; that they had been barbarously used in the presence of the court. Is there any thing like in this case? What interest Lord *Sandwich's* office might give him at *Portsmouth* or *Plymouth*, I don't know; but it does not serve him much here.

Mr. *Mansfield*—That he did not know what particular intimacy Lord *Sandwich* had with the freeholders of *Middlesex*; but he believed, their particular affection for him did not operate very violently. That he did not think the freeholders on the one side *Temple Bar* were so very different from the freeholders on the other.

[211] Mr. *Dunning* declared that he was ready, if necessary, to have given his assistance to clear Lord *Sandwich* from the imputation of his new acquired popularity.

Serjeant *Glynn* for the defendant —That Mr. *Miller* had declared his apprehension of a *Middlesex* jury, that whatever the reasons of his apprehensions might be, it would make no difference as to the trouble of producing witnesses; that the cause of action arose in *London*; that though it was held in the law a case of *scandalum magnatum*, gave him a power to lay his *venue* where he pleased; and, tho' the authorities might seem too strong to be over-ruled, yet he hoped, if it was still open, their Lordships' breast would not incline to such a determination: That the reason given that a lord's character was injured in every country, was equally applicable to any other man of any notice in the world.

That he imagined the slightest objection from shewing cause of apprehension, would be sufficient with their Lordships to obtain a removal of the *venue*, which would be only pursuing the principles of law. In motions for change of the

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the *venue*, the court is not anxious to know how far the excuse is grounded. Lord *Shaftsbury* had his *venue* laid rightly; and yet very little matter was there thought necessary to change the *venue*.

That in the case of Lord *Gerard*, an action was brought for words, and the *venue* was changed; *because*, *per curiam*—he should not as a *peer* take an advantage which might prejudice the defendant.

Lord *Mansfield*—The law is extremely clear, admitted by the counsel, admitted by the motion, that for scandalous words a peer may lay the *venue* where he pleases. There are many other cases in which the *venue* may be laid any where. If a ground is shewn, the court will grant a change of the *venue* for a fair trial. But are the freeholders of *Middlesex* such despicable wretches, that a peer would have more weight with them than a cobbler? And as the defendant has the knight of the shire for his counsel, I suppose that will be a full counterbalance.

RULE DISCHARGED,

Of *scandalum magnatum*, vide 3 *Ed. 1. c. 34.*

Maxims of law.

Ex maleficio non oritur contractus.

Par scientia pares contrahentes facit,

Insurance.

[212]

ON a motion for a new trial.

The cause had been tried, and a verdict found by a special jury of merchants.

It appeared that the defendant had insured a ship which was to sail from *Poole* to *Newcastle*, for 1000*l.* This ship was lost; and after the loss, defendant writes to desire the insurance may be increased. The letter is dated on a day when no post went out; the next day, the account of the loss of this vessel is in the papers; but the defendant does not take out the letter or retract. The notice and the loss being discovered, the under-writer sues against this insurance as fraudulently obtained, and void.

The question turned principally on when the ship to be insured was to sail, and whether it was in port or no, at the time of the insurance procured; and whether the defendant

defendant knew of the loss when he wrote for the additional insurance?

The jury found for the defendant.

The plaintiff said, he believed the ship was in port when he insured, at the time of making the insurance, because the wind had been easterly since he arrived at *Poole*. The plaintiff too complained, that the letter he received from the captain of the vessel was either falsified as to the date, or being put in on a day when no post went out, he should have taken it out of the office and dispatched another some way more expeditiously.

The letter was to this effect: "Depend upon it I shall use all expedition, and sail the first opportunity; every thing is ready."

He complains that he had no notion when the ship would sail; and that this intelligence did not arrive in time, he believes fraudulently; the letter being dated on a day when no post goes out.

[213] On the other hand it was said, 'twas strange the plaintiff, being in *London*, having this business of insurance in contemplation, and curious to know when the ship would sail, or whether it had not sailed already, should not do what any the idlest man in the world would have done, either go into a coffee-house, or read a newspaper. If he had, he might have seen that ships had gone out about the time that this ship of the defendant's did go, and were lost; that as to the date of the letter, it was very remarkable that the under-writer should not take notice of this, either mistake or misrepresentation, till the ship was lost; which, it was observed, looked like unaccountable laches or craft on that side. That there was, at least, a counterbalance of evidence, on which a special jury of merchants were extremely competent to decide; * and that the court, in such a case, would hardly interpose. And that though a full disclosure is required by the law of insurance, yet it must be supposed of such circumstances, of which it would not be natural to imagine the plaintiff was better informed than the defendant; the contrary of which, it was alledged, seemed here.

Vide Da Costa against Scandret, Parker's Laws of Shipping and Insurance, p. 311.

Lord Mansfield—"Tis very proper that all matters, especially of this nature, should be so conducted, that the party guilty of fraud, may see they are *not like to gain* by it, It is always by *circumstances* that fraud is discovered. And 'tis very remarkable here, that this gentleman insured in *London*, Dolus & fraus legibus invisa. Nil calliditate stultius ex facto jus oritur.

from

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from *Poole* to *Newcastle*, 1000l. only. That *after* the time when the account came to *Poole* of his ship being *lost* in pailing to *Newcastle*, he writes for a *farther* insurance. It *may* be discovered, whether he did not *actually* read the paper which gives this account; it *may* be discovered *when* this letter was put into the post; which, it was *strange* a man of business should send, when *no* post went out, and without waiting for *what* news *that* or the *next* should bring; and, that on the *next* day's intelligence, he did not correct his notice. Something too may be collected from any *indorsing* that may appear to have been made by the office, importing the time on which the letter went out. I remember a case at *Poole*, which turned on that only. I *never* have any difficulty in altering my opinion: At first, I thought the matter *suspicious*, afterwards I doubted; and am *now* returned to my former opinion.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Point resolved by Lord *Mansfield* at *Nisi Prius*.

WHEN the principal is made liable by the bill being delivered to him, though the agent agrees for payment, you may charge the principal.

Jury.

A Juryman being put on the pannel, excused himself on account of age, being eighty.

Lord *Mansfield* discharged him, and said they did *very wrong* to put him on the pannel.

Of exemptions from juries, Vide statute of Westminster 2. 13 *Edw. 1. c. 38*, that old men above the age of seventy, persons continually sick or diseased, at the time of summons or not dwelling in the county, shall not be summoned. [214]

Apothecaries within *London* and seven miles thereof, being free of the company, and country apothecaries who have served seven years apprenticeship, shall be exempted from serving on juries, and their return shall be void, unless they voluntarily consent to serve.

Clergymen cannot be impannelled on juries. *

Dissenting teachers qualified under the toleration act, exempted from serving as jurors.

Quakers. And of such of these privileges as are since the statute 13 *Edw. 1.* the jurors ought to come in *person* and

* Nemo militans Deo implicet se negotiis secularibus.

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and claim their privilege, for the sheriff cannot return it; and if any answer be made, the *jury* must try it.

Counsellors, attornies, clerks and other ministers of the king's courts, are not to serve on juries.

A lord of parliament shall not be returned on a jury: But if he is, the pannel is not void; but he may challenge to it himself, or the party may challenge him.

Tenants in ancient demesne, ministers of the forest out of the 18, forest, coroners, officers of the sheriff, &c. vide the writ *De non ponendis in assisa et juratis*.

Persons may be exempted by the king's charter; yet, in a grand assize, perambulation or attain, such exemption shall not serve, † vide 52 H. 3. statute of *Marlebridge*, c. 14. which says, *de chartis vero exemptionis et libertatis*, &c. as touching charters of exemption and privilege, that those who obtain them should not be put in assizes or juries, or any recognitions, it is provided: That if their oath be so necessary that without them justice cannot be done, (as in the grand assize and perambulations, and deeds or writings of agreements, where witnesses are named, or attainments or the like) that they be compelled to swear, saving to them otherwise their privilege and exemption as aforesaid.

[215]

Anno solutis 1267.

In *Berkley's* case, and some excellent learning in *Nicholles* vers. *Nicholles*, vide *Plowden's* case by the same admirable reporter.

Tickell against Read.

A master may justify the assault, that the plaintiff was beating his servant, and that he prevented him, which was the assault, &c. of which the plaintiff complains.

ACTION of assault and battery, defendant pleads the general issue, not guilty; and also a special plea in justification, that he assisted his servant, whom the plaintiff was beating.

Contended, that the law will not justify a master interposing on an assault against his servant, by assaulting the person who beats the servant, as it does a servant in like case interposing for his master; because it was the duty of the servant, who was hired to serve and be assistant to his master's person, but not so the master to the servant.

† Necessitas publica major est quam privata. Vide *Baron's Last Treatise*.
Non potest rex gratiam facere cum injuria alterius.
Rex non potest facere injuriam.
Lex communis ita prerogativam regis admetita est ut ne cujus libertatem tollant ledantve. Vide *Plowden*.

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On the other hand it was contended to this effect nearly; Vide Co. Inst. 65. of the reciprocal duties between lord and tenant.
 duty of master and servant was reciprocal; and if the servant owed to the master fidelity and obedience, the master owed to the servant protection and defence; and might, therefore, well justify by this plea.

Lord Mansfield—I cannot tell them a master interposing when his servant is assailed, is not justifiable, under the circumstances of the case, as well as a servant interposing for a master: *It rests on the relation.*

Note, that Burn cites Hawkins, that there are opinions a master shall not forfeit a recognizance for breach of the peace for beating another in defence of his servant; but Burn cites also Salkeld 407, that a master cannot justify, because he might have an action for the loss of his service. But the reason of the case seemed there (and note, it was not the principal case, but a case cited in argument) that the defendant pleaded an assault in defence of his possession, (which was, considering his servant too much, as his goods and chattels, and, as far as that was the ground of his defence, he had his remedy by action for the loss of the value of his service) but if he had justified that he did it in defence of his servant, I see no reason from that case, or any principles of justice or law, why the plea might not have been allowed; for when a servant defends his master, it is not for his own sake, but for his master's; and when the master defends his servant, a man like himself susceptible of wounds and injuries, an *Englishman*, or at least free by being in *England*, a person under his special protection, it seems to be very far from sufficient to say, the master needed not to have been a loser if his servant's bones had been broken; for he might have recovered in an action for loss of service. What compensation or benefit is this to the servant? And the true justification, I take it is, that he did it in defence of the servant, and by obligation of that protection which he owed him for his service. And on the whole, I think, a master would much better deserve to lose the benefit of an action for loss of service, if he did not defend his servant when he was able from a violent assault, which might endanger his limbs or life, than that he should be precluded from giving that defence, because truly, let what will fall to the servant short of death, the master may recover in damages, and shall only lose and be punished,

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nished, if he gives that defence which he owes in a case of danger and unjust assault to his servant, not having performed all the duty of a master barely by paying his wages.

Den, on the demise of Vernon, *against* Ogle and others.

QUESTION, whether settlement voluntary or for valuable consideration?

By deed in 1712, father settles upon his son, in consideration of marriage and the portion his wife was to bring him, to the son for life, to his wife for life, remainder to the issue male of that or any other marriage, remainder to *Francis Ogle* the defendant.

In 1723 another settlement, in consideration of marriage of his son with a second wife, to the son for life, to the wife for life, remainder to the issue of his son by his first wife.

Argued, that the issue of the second marriage should take before the defendant.

Jenkins
vers. Key-
mis in Ex-
cheq; vide
also 237.
the opinion
of the Ld.
Keeper
Bridgman.
[217]

1 *Lev.* 150. consideration of first marriage extended to the issue of a second marriage.

2 *Peere Williams* 485. *Osgood* against *Strode* and others, before Lord *Macclesfield*.

Father and son, on the son's marriage, article to settle lands on the husband for life, remainder to the wife for life, remainder to the issue male of the marriage, remainder to the nephew in fee. If the settler had the sole interest in himself, the limitation to the nephew is voluntary; otherwise, if the son had an interest, so that without him the father could not make the settlement; for then it shall be understood that the father stipulates with the son that he will come into the agreement, if the son consents that on failure of the precedent limitations, the estate shall go over to the nephew.

Rule.

Lord *Mansfield*—If a father, on the marriage of his son, settles an estate, it is an established rule, *before* all cases, that nothing is *more common* than to limit over to a *younger* son, on failure of issue of the *eldest* son.

Deed of settlement, 1712. Settlement in general terms, in favour of all the sons and daughters of the eldest brother, before the issue of the younger.

The lessor of the plaintiff's title springs out of the settlement in 1723. The parties are, the father and his two sons

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sons on one part; *A. Mills*, the intended wife, on the second part; and the trustees on the third part.

If the settlement is set aside, it must be on the 27 *Eliz.* Construction of 27 *Eliz.* against fraudulent conveyances. The lessor must set aside the first settlement as fraudulent, and claim under the second settlement as a purchaser. This act, by the *preamble*, *body*, and *whole tenor*, is provided against *injury* to be done to *bona fide purchasers*, by making the conveyance void against purchasers only. * If the settlement is set aside as *fraudulent*, it must be only because it's voluntary.

In the settlement of 1723, the settlement on the eldest son is on a *valuable consideration*, the payment of four hundred pounds out of his wife's portion, to *Philip*, the father. There is *no consideration* with respect to *Francis*, under whom the lessor claims; Therefore *Francis*, on a voluntary consideration *merely*, should not set aside his brother from taking according to the devise of 1712. †

In 1728 a deed of settlement is made, reciting the deed of 1712, and a second marriage takes place, between the eldest son and *Jane Wilson*, on the faith evidently of the deed. Supposing you have it against you on the other deed, can you lay any title under the deed of 1728? What was done with the deed of 1712?

[It was answered, it continues in the hands of trustees, [218] who have done no act to pass the interest out of them.]

Mr. Justice *Aston* said, Why, the trustees executed the deed of 1723.

Lord *Mansfield* continued—The whole turns upon the deed of 1723. If the trustees thought any thing of the deed of 1712, the conveyance is fraudulent.

In the second there is a limitation to the heirs general of the eldest son by the first marriage; he giving up the general estate-tail to his issue-male by any marriage. Whether this were a mistake or no, there is an immediate limitation in favour of *Francis*.

It was said, if the representative of *Philip's* daughter by the second marriage should take, it would be against his own bargain: And that, probably, the failure of issue of the

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* Perquisitum est ad quod quis pervenerit facto aut assensu suo non delictis neque delicto. V. 3 Inst. 3.

† In pari causa potior est conditio defendentis.

Consideratio bona est sanguinis vel affectus naturalis.

Consideratio æstimabilis est matrimonii vel pecuniæ. V. *Twynne's case*, 1 Rep.

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the first marriage was an event not in contemplation of the parties at the time of the settlement in 1723.

Mr. Justice *Aston* cited *Doe*, on the demise of *Hammerdon*, against *Wilton*.

Bankrupt.

ON a question, Whether an innkeeper sending out wine, dealt as a chapman in liquors, or no; the court would not determine, but left it to the jury, as depending on the quantity in evidence.

Warrant of Transportation.

QUESTION, on entering into a recognizance for transportation, Whether this court, or the judges of assize, were entitled to fix the time in which the party recognizor should transport himself.

V. 4 G. c.
11.

Mr. *Cowper* urged, the general superintendency of this court, wherever a recognizance was to be entered into with the crown; and therefore, that the power was always discretionary in this court, as to the time in which the party should transport himself.

[219]

James against Price.

Action of Trover. Case from the Devon Assizes.

AGREEMENT for the exchange of the *Folly*, the plaintiff's vessel, for the *Rooker*, the defendant's vessel. The plaintiff was to give twenty-five guineas to boot; and if the *Folly* was lost in the voyage she was then upon then thirty guineas besides. The plaintiff paid a guinea earnest.

The defendant wrote to the plaintiff an excuse for not sending the *Rooker*, because it had been previously sold to Lord *Courtney*.

The plaintiff desired his peremptory answer; because if the *Folly* was lost, it would be to the defendant's hurt. He afterwards tendered the twenty-four guineas, a guinea being deducted on account of the earnest paid; but the defendant would not accept. Afterwards, the *Folly* was lost on another voyage. The plaintiff brought *trover* for the *Rooker*, the defendant's vessel.

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It was contended for the plaintiff, that the earnest having been paid, and tender of the rest of the money, was equivalent to an actual delivery and payment. That *trover* was a good action to recover property *tortiously* converted, though the actual possession was never in the party: For that the property was vested. Vide Reynolds and Golightly, supra.

Cro. Eliz. 866. Action of detinue for certain parcels of plate. Contended, that as there was no delivery actual by bailment, but only bargain and sale, detinue would not lie. But held well enough, and the condition being performed, that he should have the plate again. And though the case was that the plaintiff had sold the plate to the defendant, upon condition, that on payment of such a sum, on such a day, the indenture should be void; and though the sum was paid at the day, yet there being an indorsement on the deed, by consent of both, that if the plaintiff should pay such a sum on such a subsequent day, he should have them again, this was held sufficient for the plaintiff to maintain detinue of the goods, though by the defendant's paying the sum at the first day, they had ceased to be the property of the plaintiff's and if detinue would lie, so would *trover*; and if *trover* would lie in that case, still more in this. Bateman and Elman.

Mr. Mansfield, on the other hand—That the plaintiff could not recover by this action: That whether on hearing witnesses, they would be able to recover on *assumpsit*, was uncertain: But that no property was *transferred*, which is necessary to support *trover*. That to say, it is a tortious conversion, is begging the question. That in a case from *Roll's Abridgment*, (which had been cited on the other side [220] by Mr. Cowper) there was delivery from A. to B. for the benefit of a third person; the property *actually passed* from A. and *vested* in the third person, by being *transferred* to B. who represented that third person. That the case in *Croke* appeared to be only that the vendor of goods actually sold, on tender of money, recovers against the vendee. That a case in *Bulstrode* (which had been cited) seemed just like that in *Roll's Abridgment*: That in the case in *Cro. Eliz.* the money being paid, it is the same as if he had never sold, the condition being performed: And the condition being a part of the deed, the property never passed from the owner, other than conditionally.

Mr. Cowper replied, that Mr. Mansfield at least seemed to admit, that the plaintiff, some way or other, was entitled, disputing only, whether by this action. Replication

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* *Quære*
de hoc and
vide Rey-
nolds and
Golightly.

That in an *assumpsit* the plaintiff, doubtless, might have recovered; but that he is not, for that reason or any other, precluded from recovering by *trover*: That the property only is necessary for *trover*. If goods are bought, money paid, goods afterwards refused to be delivered, action of *trover* lies, and even action of *detinue*, which I take it, makes no difference, but that the very goods themselves only can be recovered in *detinue*;* and so is the authority of *Noy*, that payment of earnest transfers the property.

Lord *Mansfield*—I wish you may find a *case*, Mr. *Cropper*, on which *payment* entitles to *trover*: For such a *case* would be nearly connected with this. We think the *conscience* of the *case* is entirely on your side.

Afterwards, on the fourteenth of *May*, in the same term and year, Lord *Mansfield* delivered the *judgment* of the *Court*, to this effect.

This is an action of *trover*. [And after stating the *case*] The question was, not on the *justice* of the *case*, but on the nature of the action. You see every part of the agreement is performed by the plaintiff: On the part of the defendant there is a *breach* of contract; but there is likewise a *special injury*, the *detainure* of the vessel. An action of *detinue* would have been good: An action of *trover* then, which goes on *detainer* and conversion, what will its effect be? It's laid down by Lord Chief Justice *Holt*, that where a man keeps what another has a right of property in, this keeping is a *conversion*, and *tortious*.

[221] If the *cases* stand with this *doctrine*, the point is clear. And very happily, the more the law is looked into, the more it appears founded in equity, reason, and good sense.*

Noy's Maxims, c. 42, page 86 to 88. If I sell my horse for money, I may keep him till the money is paid: But if I do presently tender the money, and it is refused, I may take the horse, or have my action for the detainment.

Godbolt, 339.

Cumberback, 341, B. tenders the money, the property is altered.

Noy's Maxims. Exchange of an horse; the earnest binds the bargain †

We

* *Lex est sanctio iusta iubens honesta et prohibens contraria.*

Lex est summa ratio.

Ratio est anima legis.

Nulla vetita aut turpia presumuntur, sed contraria omnia legitima atque honesta.

† *Quod arrhabonis loco persolvitur pactum ligat.*

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We observe, that the grounds in fact in this case, are very strong: The vender did every thing in his power; we wished to be satisfied that the law was on his side; we have considered the authorities, and are very glad to find it is so.

JUDGMENT FOR THE PLAINTIFF.

Goodright, on Demise of Parrack, *against* Patch.

LIMITATION to his daughter *C. Parrack*, for life, without impeachment of waste; And from and after the expiration of that term, to her son and sons, daughter and daughters, *equally* to be divided; and on default of such son and sons, daughter and daughters, limitation over. Contended, this is an estate in *fee*; because no limitation to restrain it: Or if not in *fee*, then an estate-tail. *Son and sons* are *nomina collectiva*; and though daughter and daughters were not then so determined, yet they are within the reason.

Here are words correspondent with those of *body*: The son or sons of *C. P.* As there were *children*, there could be no default of sons, in the *restrained* sense of the term sons, because a *default* of them infers a *negative* of their coming into *existence*; and by no means signifies the same as *failure*. But, taking *sons* to mean *issue*, then *default* will have it's proper and usual import.

[222]

On the other side, Though it is probably the general intent of a testator, when he gives an estate, without particular *limitation*, to pass an estate in *fee*, yet it must appear on some circumstances; or otherwise the construction of law will prevail; which makes it an estate for life. That if *default* be taken strictly, then if a child had been born to *Catherine*, the estate had vested in that child: On the death of that child, an infant, the elder brother of *Thomas* would have taken, *contrary* to the *intent*, and the remainder over to *Thomas* not have operated. That the word son or sons, daughter or daughters, of *Catherine* were only a *designatio personæ*: That the words *lawfully begotten* make no difference: For, Lord Coke says, every child must be of the body. (*Quod nota nam profecto si ipse non dixisset opinor in dubium cecidisset an ita lex sentiret neminem sine parentibus nasci.*) But if a man devises an estate to husband and wife, and after their death then to their *children*, whatever child or children they shall have after shall take an entailed estate, though there was none at the time. That the evidence of the testator's *intent*, in such a case as this, to over-rule the operation

operation of law; must amount to a moral certainty; almost a demonstration.

In replication, it was argued, that no moral certainty, but such hints as could be spelt out, explanatory of intention, were the guide the court had been accustomed to take in such cases. The limitation being wanted, there is only a description of the person, it is said: But default of such son and sons, daughter and daughters, points out limitation. Lord Coke's reason in *Wilde's* case has been often questioned.

Lord Mansfield—In this case, it is difficult to come at the intent of testator: *Quod valuit non dixit*. Something has been omitted: It is highly probable he meant an estate in fee or in tail. I really can't find a ground.

We will take a little time to see whether we can make any thing of it. As to default of such son or sons, daughter or daughters, it would have been hard to extend it, if a child had been born and died immediately.

Mr. Justice Aston—It seems extraordinary, that he should make his favourite daughter's children tenants for life, limitation over in fee, to Thomas, the son of the other daughter.

Lord Mansfield—I can make a conjecture, but can't find any thing upon the will. The misfortune is, it is nonsense.

[223] 28 June.

Lord Mansfield—This case stands for judgment of the court. One T. B. being seized in fee of the premises, makes his will. It appears he had two daughters, because he gives them 5l. a-piece by his will. He gives a messuage and tenement to his wife; and also the eighth part of another, during the term of her life.

After her decease, to trustees, their heirs and assigns for ever, to preserve contingent remainders, in trust, for C. Parrack, his daughter, for life; remainder to the son or sons, daughter or daughters of C. lawfully to be begotten, equally to be divided among them, if more than one; and for want of such issue, to his grandson, T. Parrack, his heirs and assigns for ever: The rest and residue to his wife.

C. had no children at the time of the will, but three at the time of his decease; a son and two daughters. It is not material to state how the parties in ejectment come to claim; as the only question is, whether the devise to "son or sons, daughter or daughters," be an estate for life or of inheritance.

inheritance? Now the rule of law is *settled*, by analogy from a variety of cases, that where there are *no* words of *limitation*, general words will operate *no more* than an estate for life in the devisee. The second rule is, that in *such* case, the words *share and share alike, or equally to be divided*, shall not enlarge the estate; but these words shall have another legal operation. It has been truly argued from the bar, that the *intent* of the party is *generally counteracted* by this rule; I believe this to be true: For testators generally don't take the difference between a *real* devise, and a devise of *chattels*; and therefore, the court *will always catch at circumstances* expressing *intent*, though there be no express words. I recollect but one case cited at the bar, to support the interpretation of the devise, so as to give an estate of inheritance.

Burr. Rep. 1895. *Oates*, on the demise of *Wigfall*, against *Brydon*. A woman devised her *house* to her husband for life; remainder to her brother for life; and then to *seven* persons, share and share alike; "but if my husband die before my brother, then my will is, that it be *divided amongst them*." The master has *marked* these *particular* words as the *ground* of the judgment. The house was worth about 100l. the words could not operate to make them tenants in common; for that had been done before: It can't make a division of annual value; and a specific division of the house into seven parts cannot be put in execution, to the benefit of any of the parties.

There is another case, in which the children take a fee. [224] An *entire* fee was given to trustees; the rest of the rents and profits to be *divided* among them when they attain the age of twenty-one. The court *collected* they were to take the profits proceeding when they attained the age of twenty-one, and also a *fee*, because the trustees had one. *Mod. Rep.*

In this case, with all the desire possible to support the conjecture I *really* have, that the testator did *not* mean to give to *Thomas* immediately after the *life* of the *sons* or *daughters* of *C.* I can find no ground. It might have been an *executory devise*, with the words, "in case *C. Parrack* die without *issue* in my life time; or, in case the *issue* of her body should die without *issue* in my life time, then I give over." An implication might have been grounded of considerable weight, but here we must raise an *implication* upon an *implication*, which is too much, and too wide.

Serjeant

Serjeant *Burland* cited the case of Lord *Hardwicke*, *Goodland* and *Goodwin* : That case would be of great importance, if it had been *fully* or *accurately* reported. I remember, I was in it, but have no note ; so that I thought certainly, that nothing material came into argument upon it. .

Case in *Atkins*, year 1746, and in *Vezey*. The only question is stated to have been, whether the children *un-born* shall take.

In the case cited there are *very* material points, if it had been argued : First, that he devises his *estate* ; then farther, the devise is to his daughter ; and for want of children of her, to his own *right heirs*, *ex parte paternâ*, which must be after failure of the issue of his *own* body, that is to say, issue of his *daughter*. We can see no ground here to consider the devise as more than a devise for *life*. The consequence is, JUDGMENT for the DEFENDANT.

The describing of the messuage by it's particular *locality*, was relied on by his Lordship as one of the reasons of his judgment,

Attachment.

IF time of exception is out, you can't justify after the expiration of the time, if you have not before ; but you may avail yourself, to stop an attachment against the sheriff.

[225]

Bail.

EXAMINATIONS of bail, Lord *Mansfield* observed, were grown to such an extent, that the court must stop them.

Indemnity to the Sheriff.

Martin against Wenham. In the Case of Mr. Wenham and others.

AN indemnity entered into for a year, as a security for the sheriff, and his officer. The defendant gives this indemnity, with sureties, to the under sheriff.

Afterwards, the defendant gives notice that he does not mean to stand by his indemnity ; and this notice is left at the under clerk's of the under sheriff.

On

On the first complexion of the affair, Lord *Mansfield* expressed himself *strongly* against this notice *discharging* the obligation. What is the effect? Can it discharge such a man's indemnity? Certainly not. It might have affected the principal in *conscience*, if the notice had been to the principal himself; but given to an agent, how is it to operate? *It cannot affect the principal farther than the agent is an agent in course of business.* If this giving up of the security had been of the course of business, it would have been good by the hands of the agent; but being no notice to him, *qua* agent, it cannot possibly reach the principal: And if they will do any thing, they must bring their action, if it can be maintained any where, against the man to whom they sent the notice.

Mr. Justice *Willes* said, that he should speak with great diffidence, and be always diffident of himself, whenever his opinion differed from the practice of the court. But that on the particular circumstances, he thought it might lie open to a new mode of examination, Mr. *Dunning* having offered to put the money into their hands.

That on the principle of law, he thought the indemnity stood till the sheriff's year was out. Especially, that Mr. *Wenman* cannot demand a discharge without the concurrence of the rest. But that as the under sheriffs did not attend at the office, they were liable for their agent's neglect.

Suppose the securities had come all together, and said, we greatly disapprove *Bolland*, your officer; we must desire you would deliver no more warrants to him: Suppose the under sheriffs had promised that they would not; would a jury, on an action for damages, not charge the sheriffs?

And what is done here? Why, they apply to the agent, [226] who does not deny the notice, but only says, he does not remember any written notice, and believes the notice was not given till after the warrant served.

Mr. Justice *Asbhurst* doubted the strength of the facts to support the motion; and doubted the principle of law, whether the sheriffs would have been chargeable, if the notice had been to them personally: Much more when to their agent only, out of the ordinary way of business.

Lord *Mansfield*—I have no doubt, if they had said, they would grant no warrants the sheriffs could never have recovered damages in point of law. But whether the undertaking of *Firth*, the agent, would have bound them, does not appear

pear to me by any means *clear*. However, though there were three persons present, only *Wenman* knows any thing of it, who cannot be a witness on the trial.*

The court at last determin'd to admit *Frith* to make a suppletory affidavit, as to what he knew about the warrant.

RULE ENLARGED.

Lord *Mansfield*—Let the writs be produced, and the accounts delivered to *Wenman*; and let *Frith* answer more fully as to the notice.

Indemnification endorsed on the writ by plaintiff's attorney.

Afterwards, on the fifteenth of *May*, *Frith's* affidavit, according to the terms of the enlarged rule, was read,
 “ That, to the best of his recollection and belief, the war-
 “ rant granted to *James Bolland*, 18 *Jan.* 1771, was deli-
 “ vered out after the notice of the defendants: That he is
 “ further confirmed in his belief, by an indemnification en-
 “ dorsed on the writ, by virtue of which the warrant is-
 “ sued.”

Lord *Mansfield*—It comes out very clearly now; and Mr. *Frith* would have done well if he had disclosed this on his former affidavit: As I am satisfied he had it in his mind then. The idea of the accounts was, to see whether the day and the particular action on which the loss happened, had been stated: It appears clearly *not*.

[227] The counsel for the defendant moved on this, that the sum of 36*l.* on which judgment had issued, and execution had been levied, might be returned to the defendants; which, I believe, was the original motion.

Lord *Mansfield*—If we grant this rule, we shall determine the question in a *summary* way: For the question is *still*, whether they, the sheriffs, are liable for the act of *Frith*?

Mr. *Dunning*—Yes, my Lord; I say the sheriffs take an indemnity, to prevent their being prejudiced by consequences.

Lord *Mansfield*—This is *very strong* on the indemnity taken by the sheriffs. I apprehend, however, the sheriffs, in action against them, may have a remedy over, either against *Frith*, as discharging the standing security, or against the plaintiff's attorney, upon the indemnification. *And we would not, by a summary proceeding, obstruct these remedies.*

If this goes there will be an immense circuitry.† *Martin* comes

* *Neminem oportet testem esse in causa sui privata.*

† Note a circumstance of this case, which, I think, appears by the affidavits, that when the sheriff came upon *Wenman*, he desired they would

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comes against *Frith*, *Frith* against *Priddle*. (The plaintiff's attorney.) I think it would be proper to enlarge the rule farther. *Frith* should shew cause why *he* should not be answerable to the *sheriffs*; and *Priddle*, both to them and *Frith*.

Lord *Mansfield* took notice, that they had not brought in this case the proper parties before the court: But that they might make *Frith* and *Priddle* parties to another rule; And that it was to be considered, whether *Priddle* was not understood as the sole security. That the rule should be suspended; and might be drawn for a very short day. His Lordship thought, that they could have nothing to answer to it, and that the *sheriffs* should be entitled to recover.

RULE ENLARGED, and *Frith* and *Priddle* to answer why they should not indemnify the *sheriffs*, as to 360*l.* and proportionable poundage.

Lord *Mansfield* asked, in what capacity *Frith* acted?

It was answered, as an under clerk.

Lord *Mansfield*—Is it usual for *under clerks* to take indemnities?

A gentleman in court said he had been an under *sheriff* for many years, and never knew it.

Serjeant *Davy* said, it was *customary* in *Devon*, and they [228] had no other way.

I find no more of this case; but I take it, that the court appear to have decided on it: That an agent of the under *sheriff*, as clerk, cannot bind the *sheriff* or under *sheriff* to matters not properly within his business.

That when a person becomes surety for a year, with others, he can't discharge the indemnity given to the *sheriff* without the consent of the *sheriff*, and of the other sureties.

Vide
Wood's
Inst. 55. 56.

That if the under *sheriff*, in this case, had taken notice of what had been said to *Frith*, and had said, he would deliver no more warrants to *Bolland*, *Wenman* declaring, if he did, he would not stand to his indemnity, the under *sheriff*, in such case, would not have been entitled to recover damages in this action.

Note too, the pains taken by the court to avoid circuitry of action.

Lex non
amat circuitum.

Plea Boni judicis
est lites dirimere.

See *Levin* first, another of the sureties, which they did. *Levin* complained, and *Wenman* gave him an indemnity, on payment of 400*l.*

Plea of Coverture.

WHETHER necessary, where a *feme covert* is arrested; or whether she shall be discharged summarily upon motion?

This was in a case in which Mrs. *Baddeley* had been arrested, and applied to be discharged on motion, and a copy of the marriage, accompanied with an affidavit that her husband was still living.

Mr. Justice *Aston* said, that he had learned from one of the judges of the Common Pleas, that in three cases cited in a question there, it was held in great doubt, whether a copy of the register was sufficient; because the wife, perhaps, lived separately from her husband.

Mr. *Murphy*, the counsel in the cause, was desired to enquire into the case in the Common Pleas,

Indictment.

In Arrest of Judgment.

OBJECTION to an indictment, that the *time* of the offence charged is not specified.

Indictment that before and after the sixth of June, the prosecutor was a Justice of Peace:

And that at the petty sessions held at Westminster, the defendant then and there spoke, &c. bad.

[*229]

ab absurdo.
ab inconveni-
nienti.

* The indictment was for words spoken of a Justice of Peace, in the execution of his office. The words were, "You did not do justice." It's charged in the indictment, that the words were spoken at the petty sessions holden for *Westminster*.

It was argued against the motion, that the time and place was sufficiently stated by collection from the whole indictment; For first, that the indictment sets forth, that on the sixth of *June*, *W. B.* was a Justice of Peace; then in the clause in question, that at the petty sessions holden for *Westminster*, then and there defendant spoke, &c.

That in this offence so much strictness is not necessary as in a capital question; that even in capital cases *ad tunc et ibidem* shall refer to the time mentioned first in the indictment, without repetition.

Farther, it was argued to what other time it could refer. Lord *Hale* says, that even in capital cases, the degree of strictness required in indictments is the disease and reproach of the law, and calls for remedy.

That

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That the reason assigned why the Time must be so particularly stated is, that the *forfeiture* may relate accordingly; and that in case of murder it may appear, whether the death was within the year and the day; that this reason did not apply to this case.

ex artificio-
alibus.

a dissimili.

That even where it might apply, it did not hold in practice; for that a man might be indicted for having given the wound in 1770, and the death might be proved in 1769 sufficiently for conviction.

A non-usu.
Vide 2
Hale, Plac.
Cor. c. 25.
p. 179. Em-
lyn's edit.

Mr. Serjeant *Hawkins*, *Plac. Cor.* was cited.

Mr. Serjeant *Davy* said, that he should not cite either *Hale* or Serjeant *Hawkins*; he hoped in such a case as this, a few words from Serjeant *Davy* would be sufficient. That if the *then* could be preferred to *one* time only, he admitted the once mentioning of the time was sufficient. That here nobody could tell the time in this case; that the indictment set forth that *before and after* the 6th of *June* Mr. *B.* was a justice, &c. and that at the petty sessions holden for *Westminster*, *then* and there the defendant spoke, &c. Whether the *then* referred to *all*, *any*, or *what time* he could not tell; perhaps he regarded all times that ever were or shall be; he fancied the court would not help the indictment, by guessing what time, or by referring it to all.

Cui curia assensit.

And JUDGMENT WAS accordingly ARRESTED thereupon.

New Trial.

Rule.

[230]

NEVER take a rule for a new trial, without special order of the court beyond four days.*

Lord
Mansfield.

Langfielde, on Demise of Banton against
Hodges, Copyholder.

In Ejecution.

BY the custom of the manor, copyholds were held upon lives.

Equitable
presumpti-
on rebutted
by parol
evidence.

A person

* Nulli negabimus aut differemus justitiam vel rectum, Ma. Char.

A person who was tenant of certain copyhold lands in the manor, according to the custom, put in the name of the lessor of the plaintiff, who was his nephew, with his own.

Question, Whether the putting in his name should be considered as an advancement in consideration of blood and natural affection, or only make this nephew a trustee.

It was, I think, admitted, that the *equitable presumption* was, that he took *only as trustee*; but to repel this presumption, *parol* evidence was offered that he afterwards said—
“*I give it him.*”

Lord Mansfield thought, that as the nephew was in of the legal estate before these words, “*I give it him,*” they were *proper evidence* to be left to the jury of the intent upon the original taking, and lead naturally to interpret it. And that wherever a legal estate is taken away by *equitable presumption*, you may always rebut by *parol* evidence.

Part of the evidence went to prove, that he had purchased with an intent to give it to his nephew.

The administrator of the uncle claimed on the other side.

Lord Mansfield said, he thought the administrator's claim in equity was very unquestionable; and that he never heard of such a case.

Vide Dutches Dowager of Beaufort.

Vide Lamplugh and Lamplugh
1 Peere Williams,
term Mich.
1709. p.
111. and
the case following it,
and the case following
of Lady Dowager
Granville.

[231] It was said, however to have been determined in a case of ——— vers. Crew, 1 Peere Williams.

Note, This case I do not find: But there is a case of Philips vers. Philips, *termina pasche* 1701. reported in Peere Williams, where it was determined in *communibanco*, that an estate *per auter vie*, should go to the administrator (by the statute of 29 Car. 2. c. 3. s. 12) where there was no executor.

Lord Mansfield observed, that in the case of Selwyn vers. Browne, Lord Talbot went on the residuary devise, and that *parol* evidence could not be admitted there, because it would have contradicted, not explained the devise. Lord Hardwicke thought the residuary devise not sufficiently clear, and suspected fraud; neither decreed in that case on the ground of equitable presumption, not to be rebutted by *parol* evidence.

That in the particular case where a man gives his executor five pounds personally for his trouble, it was decided he made him a trustee; and that upon the particular circumstances

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stances of that case, the argument of *equitable presumption* had been carried into *general application much too largely*.

It was said afterwards, that the parol evidence in *Selwyn* and *Browne* was to *raise* the equity, and not *rebut* it; and his Lordship seemed to concur in that opinion.

14 May 1773. Lord Mansfield stated the case. That it appeared in evidence that the intestate gave 600*l.* for the estate just before his death: That he had said he *intended* it *Longfelde* [his nephew] after his death, and would *give* it him: That at another time he said he had purchased it for him.

He had been dead nine years—it did not appear when the plaintiff entered. And it was argued,

1st, Whether parol evidence was good or admissible at all in this case?

2d, Whether to rebut the equitable presumption?

3d, Whether, if parol evidence could be admitted, and might rebut an equitable presumption, the evidence in this case was sufficient to that purpose?

As to another point, whether a new admittance necessary, on all hands, that where there are remainders over, the first admittance is sufficient to ground an ejectment. That a man shall *never* be *non-suited* by a legal estate in his own trustee. [132]

It was contended, that by general presumption, where a man purchases a copyhold, and pays the *fine*, the purchase-money going in *diminution* of his *personal* estate, that there is, therefore, a *resulting trust* to the executor or administrator.

The administrator cannot hold the estate, if the intestate has given it over to another; nor can he defeat the estate of that other.

Renewal of Lease, with several estate for life, by custom of the manor; the first taker cannot by surrender bar the succession: [Perhaps considering him as a trustee for the remainders, vide *Mansel* and *Mansel*, 2 *Peere Williams*.]

It is said, it's not within the Statute of Frauds; because there is an estate by legal implication only, and that this will not do against the equitable presumption. I am clear there may be a rebuttal by parol evidence.

In Equity Cases abridged, this rebutter is set up to support a trust against *equitable implication*. There was a son, and yet they admitted a rebuttal to prove a trust. As to the evidence, it appears to me clear *quo intuitu*, the first step was taken, if a man merely says, I *give*, or *intend to give*, this

* Vide
Brett and
Rigden.

this, to be sure, passes nothing; because the intent is not legally executed: 'Tis a rule.* But here he purchased; he put in his nephew's name; his nephew was admitted; he intended it for his nephew ('tis said in evidence) after his death; from the purchase to the last minute of his life, he declared his intention. WE ALL AGREE: And the CONSEQUENCE is, that the plaintiff has both the *legal* and *equitable* estate.

JUDGMENT FOR THE PLAINTIFF.

His Lordship observed, that an equitable presumption was only a kind of *arbitrary implication* raised, to stand only till some *reasonable proof* brought to the contrary.

Holloway, Parson of Swallowfield, *against*
Hewit.

For a new Trial.

ACTION against defendant for non-payment of
tithes.

[*233]
Vide of
tithes com-
mentar.

b. 2. c. 3.
18 E. 3. ft.
3. c. 7. 45.
Ed. 3. c. 3.
1 R. 2. c.
13. 5 H. 4.
c. 11. 7 H.
4. c. 6. 27.
H. 8. c. 20.
32 H. 8. c.
7. 27 H. 8.
c. 21. 37 H.
8. c. 12. 2
& 3 Ed. 6.
c. 13. f. 12.
31 H. 8. c.
13. f. 1. 22
& 23 C. 2.
c. 15. 3 W.
& M. c. 3.
11 & 12 W.
3. c. 16. 1
G. 1. ft. 2.
c. 26. f. 2.
Justices of
Peace em-
powered to
give reme-
dy for small

Plaintiff alledged cutting down clover grass and making it into hay, and carrying it off, without having first set out the tythes, which * by right ought to have been set out for the plaintiff, according to immemorial usage, &c.

Witness called, who said it was the custom to make the clover grass into hay-cocks before they set out the tithes, and that they used to pay in kind.

Another witness says, he believes they used to pay tithe in kind for every tenth cock.

Another says, that for twenty years back they took tithe in kind.

Another swears to fifty years back.

Another that he lived ever since the hard winter at *Swallowfield*, that they used then to take tithe in kind.

Another, I think said, that he had lived twenty-five years at *Swallowfield*, that the general custom was to make into hay, and then set out the tithes before they carried: That at first he *paid*; but after they took the tithes in kind.

Another, that for eighteen years it has always been taken in *kind*, but that before it used to be *paid* for: However, thirty years ago, he says it used to be taken in *kind*.

Evidence for defendant—A witness, who says he was servant to young *Ellis*, who was then the farmer of the tithes; that about eighteen years ago, a dispute arose about the payment. Mr. *Ellis* looked into the articles, and said he must set out the tithes, for else it would make a bad custom;

custom; that if they found any would *not* set out, they must make agreement.

tithes, 7 &
8 W. 3. c.
6 4. Ann.
c. 27.

Another witness—That after he left the parish, it was not the reputation of the parish that tithes were to be paid in kind.

Several witnesses for the plaintiff spoke of this *Ellis* and of the custom as before stated on the part of the plaintiff.

The jury found for the defendant.

The balance of the evidence appeared extremely strong on the part of the plaintiff; there were but two evidences in all, such as they were, on the part of the defendant.

It was objected, that on a penal statute, especially when the party came in for trifling damages vexatiously, it was contended, that the verdict should not be disturbed by a new trial—unless prevarication appeared, or tampering with the jury. [234]

Jarvis qui tam against *Hall*, on the Game Act—for killing an hare. *Wilson's Rep.* Lord Chief Justice *Lee* said, that he did not remember that ever a new trial was granted on a penal action.

Lord *Mansfield*—Never on such a penal action to be sure. [For in *Strange's Reports* on a *qui tam* action for killing an hare, determined that an indictment will not lie; a summary mode of proceeding before the justices having been provided by the statute.] The King and Buck. Str. 679

Raymond's Reports. Smith—For loss of the plaintiff's house by defendant's negligently keeping of his fire. Verdict for the defendant. Lord *Holt* was dissatisfied; yet the court would not grant a new trial. Vide Salkeld 644.

Lord *Mansfield*—This was not a penal action; and I myself should have refused a new trial in that case: 'Twas a very hard one, and defendant lost his own house by it. And where a verdict is against the *form* of law, but according to the *justice* of the case, as in the *Duchess of Mazarine's Case*, the court will not unsettle the verdict.] Verdict against form, but according to justice of the case, not to be disturbed, vide Salkeld 46.

And farther, on the Statute of *Usury*, on a motion for a new trial, it was adjudged by the counsel, that the court would not even grant a rule to shew cause.

Lord *Mansfield*—What do you think upon a *bond*, if a wrong verdict for defendant.

My Lord, I don't apprehend that to be a penal action. Execution cannot be taken out for the penalty, but only for the value of the bond.

Lord *Mansfield*—The doctrine is *right*,* but is not *ap-
plicable*: These are all prosecutions by common informers.
This is a question of right; almost the only action on which
it can be tried by the common law; 'tis a most beneficial
way for the defendant of trying the title. The jury don't
give the damages; they are never directed. You might as
well say, where there are *double costs*, there shall not be a
new trial.

RULE ABSOLUTE FOR A NEW TRIAL.

[235] **O**N an action for assault and battery, and false imprison-
ment; tried at the *Salisbury* assizes before Mr. Justice
Blackstone.

Brookshaw against Hopkins.

TO set aside judgment of Nonsuit, and be at liberty to
proceed to a new trial.

Action charges that the plaintiff laid hands on the defen-
dant violently and beat him, and bound him with fetters,
and confined him in a private mad-house.

Vide 21 J.
c. 12.

Plea not guilty.—Special justification, that he is a justice
of peace, and did it in execution of his office, [the person
being mad.]

Vide 34 E.
3. c. 1.

On the part of the plaintiff this was denied to have been
done in execution of his office.

It was, by Justice *Blackstone* held, that whatever irregu-
larity, yet it was by colour of office, and therefore non-
sued the plaintiff.

Mr. *Dunning* in support of the motion—That if there ever
was a possibility of magistrates being responsible for private
assaults, he should imagine this was one of those cases of
responsibility. And that as to the former acts, at least of
those complained against, he acted not in the execution of
his office; nor within his jurisdiction. That as to the
quantity of damages that might, or ought to be recovered,
the court would not look into that, as it certainly belonged
to another tribunal.

The *Norwich* Case was stated—Lord *Mansfield* said it
arose from the officer's executing the warrant improperly;
taking up in the city, when he should have taken up in the
county. On another cited by Mr. *Dunning*, Lord *Mansfield*
observed, the order was to take up lewd women, and he
took up a modest woman.

Mr.

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Mr. *Wigmore*, on the same side with Mr. *Dunning*—That there was no warrant from the justice to take up the man; and though not denied, that if a man be furiously mad, the justice, without warrant, may detain him; this must be on the merits and evidence of the fact, and requires being tried by the country.

That there is no pretence here that it was upon information: That in cases of this sort, for a justice of peace to justify his proceeding, there ought to be something in writing.

That the two cases mentioned by Mr. *Dunning*, are on [236] the argument of *Money* and *Leach*, * and that his Lordship said there, that there were many other cases, in which the act done might not be within the jurisdiction, so as to entitle the justice to the benefit of the statute. And that Mr. Justice *Blackstone* had declared, that he thought the least colour of jurisdiction sufficient; and, at the same time, as a reason why the nonsuit would not prejudice them, that they would be at liberty to try whether it ought to have been granted.

* Vide Sir James Burrow's Rep. p. 1761, the case alluded to is *Lawson or Dawson and Clark*, and p. 1767.

Lord *Mansfield*—I dare say Mr. *Wigmore* has not lately looked into the case [to which he referred] because it turned on how far the constable was authorized as a ministerial officer. For in some cases, the warrant is a justification to the officer, though the act of the justice be not according to law, as to what it may command.

There may certainly be a material distinction as to the act; if he struck the first man he met, he does not do it within his jurisdiction.*

Mr. Justice *Ashen*—It appears it was done, perhaps, in favour of the plaintiff to prevent mischief; and in that case, though not in execution of his office, perhaps it may stand.

Lord *Mansfield*—As this has never been before the jury, but comes on the judges nonsuit, I doubt we must go on the strict point of law.

the special matter in evidence, vide 7 J. 1 c. 5. 21 J. 1. c. 12. vide Burn, 2d

Of pleading the general issue, and giving vol. tit. Jus-

tices of the Peace, f. 6. et alibi.

Irregularity.

MOTION to set aside proceedings for irregularity, the attorney's name not having been endorsed on the writ.

On

* Lex neminem ad malefaciendum hortatur; neque licentiam ulli, peccandi facit.

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On its appearing, however, that there had been something done since on the other side to continue the cause, notwithstanding this irregularity.

RULE DISCHARGED—but, I think, without costs.

[237]

Bail.

Rule.

Regula.

BAIL in the name of one of the plaintiffs only, where there are joint plaintiffs to the action, are no bail.

The notice was right, they had proceeded as far as demurrer.

The master said there was no cause in court, for want of the names of both the plaintiffs; * if the parties were in court, they might waive the exception by proceeding.

Lord *Mansfield* said he would stay proceedings till rectifying of the bail.

RULE taken to give judgment as of this term; try the writings after term; and rectify the bail—by consent.

Common Appearance.

ON a common appearance proceeding to plead, admits regularity of the appearance.

Estate pur autre vie.

IF there be an estate to *B. durante vita*, *A.* and grantee dies in life of *cestuy que vie*, and a stranger entereth as general occupant, he shall be admitted, and pay the fine. *Coke* Copyhold 62.

Estate *pur autre vie* of copyhold granted to one and his heirs; heir entereth as special occupant. Where by custom the copyhold might be extended, party shall be admitted on the extent, paying the fine. Ditto.

29 *Car. 2. c. 3.* Estate *pur autre vie* shall go to the executors or administrators, where there is no devise or occupant thereof.

Bail.

* De non apparentibus et non existentibus eadem est ratio.
Quod ab initio non valuit tractu temporis, &c.

BAIL in error cannot surrender the principal; but must 15 May. pay the money if judgment is affirmed.

The King *against* the Inhabitants of the West Riding of Yorkshire, for neglecting to Repair.

LORD *Mansfield*—You can't come here, the indictment not here: If we give an opinion, we can't give a judgment: You can't come here for an opinion to us; they should come to you. But, I don't see why by consent you may not move it for the furtherance of justice.

They moved accordingly.

The indictment was for not repairing a bridge, and two hundred feet of highway, which they had been used to repair.

They pleaded guilty for the bridge, and twenty-four feet east, and twenty-one feet west.

Not guilty for the rest.

Question 1st, Whether defendants *primâ facie* liable by statute?

Or 2d, Whether by common law?

That *primâ facie* the parish is liable to repair; and so by common law.

If the inhabitants of the West Riding at large are liable by statute, this liability should be stated on the indictment.

That there is no way of shewing them guilty on this indictment but by common law, or immemorial usage.

That the statute 22 H. 8. c. 5. gives power to justices of the peace in every shire, &c. or any four of them, to hear and determine in general sessions annoyances of bridges.

And that whereas in many parts of the kingdom it cannot be proved what hundred, &c. town or parish is liable to the repair, by reason whereof such bridges lie often long without repair, to the great annoyance of the king's subjects: Therefore it provides, that where it cannot be known and proved what hundred, &c. town or parish is liable, the shire or riding, (and as to the other cases provided for by the statute) shall be liable: But still, if it can be known and proved, that such a parish is liable, it remains charged

as

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as before the statute, and that in such case, they are not to come against the Riding.

And that the power given to the justices was not meant to take away the superintending power of the king's court at *Westminster*.

A lesson.
jurispru-
dent.

2 Inst. 6 &
7 to 706.

Lord Coke, in his reading on this statute says, this court or court of Eyre, or court of assize, or sheriff's tourn, were the only courts empowered by law to hear and determine.

The first clause of the act impowers the justices of the shire, or four of them, one of whom to be of the quorum, to hear and determine.

That the statute of 2 Ph. & M. gives them the same power.

That all the learned judges since had recognized what was before held by the common law, that *prima facie*, the parish is liable, as well for three thousand feet, as three hundred.

That the clause, on which it is supposed the question is meant to turn, is, that it would be more convenient to have the repair of roads 300 feet from bridges, determined in the quarter sessions. To be sure, because the quarter sessions sit four times a year; and therefore, it goes on, that forasmuch as if speedy remedy be not had, the inhabitants would have little avail, be it enacted, that the bridges and highways within 300 feet be repaired and maintained, whenever need shall require. Will not this be sufficiently satisfied by giving the justices authority to compel the repairing?

The law lays it upon the parish: The indictment states, that this road lies in the parish of *Selburgh*. The court will never suppose, that an immemorial duty, altering the common law, can have arisen since the statute of H. 8. and yet that they will be bound to prove an immemorial duty, by what they have laid in the indictment. That the statute does not, in this particular, alter the common law: That at least, the statute does not extend to this court, or the court of assize: That the court will take it at common law, even for that reason, without looking farther.

Lord Mansfield—That it was argued extremely well, whether the act is not declaratory of the common law: It appears it is.

Opinion of
the court
That the
act seems
declaratory
of the com-
mon law

When it does not appear who ought to repair, then it is certain that in such case, at common law, it is on the inhabitants of the county; when the road extends 300 feet from the bridge it shall end.

That

The repair at common law is on the county, when it does not appear who ought to repair.

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That the statute does not alter the power of this court at common law, but only gives a power to the quarter sessions.

That the statute does not alter the jurisdiction of the court.

Brookshaw *against* Hopkins.

[240]

ON the motion above, for a rule to discharge a nonsuit.

Argued against the motion, that the defendant was mayor of *Shrewsbury*, and, by consequence, Justice of the Peace, by virtue of his office.

That if the merits could be gone into, the defendant had behaved with the greatest civility.

That one *Langton* complained of some ill behaviour of the plaintiff.

That the plaintiff terrified *Langton's* wife, who was with child, exceedingly.

That the defendant sent expresses to the relations, who took the plaintiff, and confined him in a mad house for six months.

Nonsuit of the plaintiff, for default of notice; and also for that the plaintiff did not bring his action within six months.

It was said, that as to the necessity of a complaint in writing, the meaning of the statute was, that the justice might not be compelled to give evidence of a complaint or information, which he did not keep in his memory for ever.

That though proper, prudent, and generally right, to have an information in writing, yet, the time being elapsed, he was not bound to shew in evidence by what authority he acted.

That for a manifest breach of the peace, in his view, the commitment was good, though without warrant.

Even had it been the case of settlement of a pauper, payment of tithes, or any case where the justice acts under a particular power, he shall not be forced to shew his authority, after such distance of time.

Lord *Mansfield*—I shall read the report.

An action of false imprisonment and binding in fetters: There is another count for a common assault; damages laid at 5000l.

Case stated, that the plaintiff was at that time perfectly in his senses, a gentleman of large fortune.

On

Justice may commit for breach of the peace in his view, without warrant or information.

[241]

On the part of the defendant a witness produced, who said he saw him behaving very angrily at *Langton's*, because he was not let in; threatened Mrs. *Langton* very much; behaved very furiously: But he could not say he was out of his senses.

That he afterwards insisted on going to the races at *Stamford*; that Mr. *Hopkins* endeavoured to persuade him not: That at last, on his growing very angry, and still insisting that he would go, Mr. *Hopkins*, the mayor, defendant in the cause, ordered the constable and the serjeant to seize and carry him to gaol; which was done. Another witness, the constable, says, the serjeant gave him orders to seize the plaintiff at *Langton's* house, and bring him before the justices. Here is a defect; it does not appear by what authority the town serjeant did this.

No part of this evidence affected the other defendant.

The plaintiff endeavoured to prove a continuation of this imprisonment, by his friends.

One of the witnesses said, he would not have taken the man to gaol [I think this was the constable] if *Hopkins* had not been mayor.

Hopkins had nothing to do with what was done by the relations of the plaintiff, and does not appear to have known what they did.

The great defect in the evidence is, that it does not appear whether *Hopkins* committed the man on complaint of *Langton*, or on his own view.

On the other side, they denied his having done what he did pursuant to, and in execution of his office.

There has been no proposal to an agreement on the part of the plaintiff, which any gentleman here is authorized to make. I don't explain the reason; there is a defect of evidence, which I don't choose to enter upon at present.

[242] I wanted to know, whether the plaintiff would have accepted the nonsuit, if the justice waives the costs of the nonsuit, which, in the case of a justice of peace, is double costs.

I am persuaded, whether *Hopkins* was guilty or not, of irregularity, or no, he did not intend any harm, but rather kindly to the plaintiff.

Mr. *Dunning*—I don't wonder your Lordship's present opinion, from the state of the evidence at present, as to the innocence, or, perhaps, good intentions, of the defendant; but I conceive the present imperfect state in which the evidence appears, is what the plaintiff complains—the stopping of the matter in its present state, is the very ground of

of his dissatisfaction. But it *might* appear in his *favour*; he conceives at least it *would*.

I differ in part in opinion with the learned judge who tried the cause. He thinks, that *colour of office* is sufficient; I think, that acting in *pursuance of office legally* is *necessary*: I do not *know* what else is acting in *execution of office*.

But a *strange* but *strong* case, that the court of Common Pleas, having *no jurisdiction in criminal cases*, should issue a writ for the *execution of a man*. They would *act* as a court certainly; and they have a *power to issue writs*: Yet, they would *not act within their jurisdiction*, or be *protected by it*.

Suppose *this court*, without *any process* before them, should order the *execution of a man*; this would be under *colour of office*; but *not in execution*.

Is there any thing done by the plaintiff that could amount to a breach of the peace? As to the defendant, he acted *being a justice*; but, as far as I can see, *not as one*.

I submit, that it will be necessary to go farther into the case.

I apprehend, that in the case of *Money and Lench*, the ground on which the court went was, that there *was* an acting by *colour of office*; but not in *legal pursuance of that office*.

[Lord Mansfield—You are very right, Mr. Dunning; and I thought so yesterday, from memory.]

I shall hope that the court will think a farther enquiry into this business is *necessary*: On which the court will *judge for or against* the conduct of the defendant, as shall appear on a fuller view.

Mr. Gee—That they had been let to proceed far enough; [243] and that nothing was to be proved strong enough to amount to a breach of the peace: That they had evidence to have gone into against the other defendant.

Being asked, why they did not come against him, as not being stopped by the objection in favour of *Hopkins*? It was answered, that he also was a magistrate. It was asked why, when the judge said there appeared nothing against the other defendant; but I don't know what was answered.

Lord Mansfield—The question is of *consequence*, as for the *protection of a justice of peace*, by construction of the statute: It is *also* of *consequence*, because it will be *final* against the plaintiff; for if we pronounce, that, on the evidence, the justice acted in *execution of his office*, then the plaintiff is too late, being *beyond six months*.

I own

. I own the *great* difficulty is, that I cannot decide upon the evidence, whether he committed upon *complaint* of *Langten*, or upon his *own view* of his behaving furiously; or upon his insisting to have his horse to go to the races. *To be sure, the act does not protect justices for an act done by PRETENCE of office:* But where an act is done *unformally*, where, in another manner, it might have been *legally* done, there, in consideration that *country gentlemen are generally* in the office that have *no emolument*, at least the *best* of them, therefore, if they do what by *law* they are *impowered* to do, and *might* have done another way, the act *protects* them from suffering for the *mere informality*.

On *complaint*, a justice may *commit*; but in strict form, the complaint should be in writing: On his own view, he may commit *without* complaint, if he has *reason* to *apprehend* the peace will be broken, though not actually broken.

The justice, too, ought to have produced witnesses, to shew the ground of the commitment.

God forbid, too, that a man should be punished for restraining the fury of a lunatic, when that is the case.

But if it is so here, Mr. *Hopkins* did not act under his office: There is special power given to two justices.

It is a great satisfaction to a judge, that a nonsuit is not conclusive.

[244] I think this rule ought to be absolute, and the cause be tried, without prejudice to the question, whether Mr. *Hopkins* acted within his office, or no.

Mr. Justice *Aston*—The intent of the act 24 G. 2. to be sure is, that on notice, the justice may tender amends, without going to trial.

I can't see on the evidence, whether the defendant acted in execution of his office, or no. I think, therefore, the rule ought to be made absolute, without prejudice to the question.

Mr. Justice *Asburst* nearly to the same effect.

Mr. Justice *Willes* was absent.

Lord *Mansfield*, however, thought it so hard a case, that he extremely wanted the parties to come to an agreement: And at last ordered the rule to stand as it did, and not absolute. He said, he was fully persuaded in his own mind, however the matter went.

RULE SUSPENDED, to see whether the parties would come an agreement.

Vide 24 G. 2. c. 44.

Case

Case of Rookes, Executor of Stansfield, & al.,
Proprietors of the Navigable Canal from
Leeds to Liverpool.

ACTION of trover and conversion for having detained wood of the property of the plaintiff.

The principal question was, Whether the jury had assessed the value of the wood, as well as of the land, in their verdict? And in point of law, whether upon the construction of the act they could?

Mr. *Wallace*—That by the act, commissioners, or any five of them, were empowered to assess the value of the lands, or underwood, in order to make a compensation.

And if the party does not choose to abide by their decision, then a jury to be summoned, to enquire and assess, and their verdict final and conclusive to all parties.

It was objected, that the verdict at 55l. per acre, did not include the wood. [245]

That the plain import of the verdict appeared to be to include the wood: That the commissioners had excepted the wood; the jury made no exceptions, and therefore certainly included it.

Evidence had been offered, that other jurors had valued lands of nearly the same value, at pretty near the same price, without the wood; and they would have introduced evidence from the jurors; that they did not mean to include the wood in their verdict. But Mr. Justice *Gould*, who tried the cause, did not think this evidence proper to be admitted; and Mr. *Wallace* hoped, that the court would think the learned judge did rightly in rejecting it: For otherwise, if such evidence were admitted, to narrow, or rather subvert a verdict, there would be nothing certain.

On the other side, that the commissioners expressly went on the value of the land only; that the jury were to try the same matter, and estimate the value on the same subject, which was the land only.

By the warrant issued, and by the only authority under which they act, they can do nothing but set a price on what had been before considered, and assessed by the commissioners.

That it was said, wood might be purchased, and pass under the name of land: Admitted; but in this mode of proceeding, they are strictly confined, and can go no farther than the warrant expressly limits their authority.

That

That they were ready to have offered evidence, that at the time the commissioners were to make a valuation of the lands, the land was not so set out that they could value the wood, either by the act or in the nature of the thing.

That they offered in evidence the declaration of the shewers themselves, taken by the jury. "Gentlemen, you are not to value the wood, but the land only." That this was the express declaration of the shewers on both sides.

[246] That they offered evidence, that the jurymen themselves acknowledged the impossibility of valuing the wood, as not being properly set out: And that on the same day, in a neighbouring wood, the same jury valued the land by itself, at the same price precisely, without the wood. That therefore, both in law they could not, and in fact they did not, nor could in the nature of the thing, value the wood: And therefore, that the plaintiff will be entitled to a new trial.

Mr. *Dunning*—That he apprehended, by referring the verdict of the jury to the precedent adjudication, and construing the two instruments together, the court would see, that the jury could not take in the wood. That though this was not, in strict propriety of words, an appeal, yet there was in it the nature of an appellant power; so that a new subject could not be included.

That parol evidence had been objected against; and parol evidence in subversion of a verdict: That however, it did not subvert, but explain and support the verdict. And that whether parol evidence was or was not received, it could never be imagined in common law, or common sense, that the matter appealed against is not to be taken into the construction of the verdict.

Lord *Mansfield*—Is there an express power to the jury, to estimate the wood separate from the land?

Mr. *Dunning*—None in terms; but the practice has always been so.

It was farther contended on the same side, that either according to their warrant the jury assessed, exclusive of the wood, or they did what was not within their authority, and therefore void.

That it appears clearly in point of fact, that they assessed no more than the commissioners; and in point of law, that they could assess no more.

That here, the whole jury said it was the land they valued, and that only. Suppose the evidence of the jury not to be admissible, that there was evidence which they were ready

ready to have given; that the jury only walked over the ground: And was this the way to make a valuation of wood? Does any body buy or sell timber so? And finally, that they either did not in fact value, or by law could not value any thing but the land.

Lord Mansfield—Upon the face of these proceedings, cannot say I am satisfied the valuation of the jury reaches to the timber.

By the act, the authority to the jury is, in case of disagreement: The warrant is, to set a value upon the land and grounds assessed by the commissioners: And to be sure their proper jurisdiction was, to value the land only: The commissioners might value the wood at another time, and the parties be satisfied.

That the power of the jury was relative to that of the commissioners and co-ordinate to it.

I am very far from being clear that the wood was taken in; so far, that I rather think it was not.

[247]

In so doubtful a case, therefore, I don't quite enter into the objection to parol evidence.

That parol evidence is proper to explain a doubtful fact.

In the nice question as to identity of action, you may, to avoid this precise objection, aver the identity of the action.

And whenever the jury have deducted, I have often ordered an indorsement to be made on the postea, to avoid the question being made, and by consent.

The rule is very wise, that a juror shall not say, "I said this in my verdict, but I don't mean according to those words, I was over-ruled"—or the like.

That though a juror shall not contradict his verdict on the cause before him, yet on the doubt what was the question before him, the evidence of a juror and other evidence is proper.

But this is only trying what was the question before the jury, which would be admitted on a judge's certificate; which might be averred by the commissioners or shewers.

Mr. Justice Aston—That there was no dispute between the parties about the wood, therefore not natural they should find for the wood—It would be great injustice to deny a new trial.

Mr. Justice Ashurst—Tis clear there was no original jurisdiction in the jury; therefore, we must take it they acted right; that is, pursuant to their warrant, by considering only the adjudication of the commissioners. And if there was an

That the power of the jury was not original; that it must be

presumed they acted according to law; that is, according to their derivative power, expressed in the warrant.

occasion

occasion for parol evidence, I think it would come in very properly.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Lord Mansfield said he suspected the jury had found the value of the wood and land *both*, though they thought of nothing but the land.

Attorney.

SERVICE to an attorney's agent considered as service to himself.*

[248]

Evidence.

Rule of Discovery.

Regula ex
exquo et bo-
no.

LORD Mansfield—If there is any deed on which nothing turns, as to the *merits* or *substance*, but which, in point of *form* is *necessary* to be *shewn*, and the parties refuse producing it, thereby putting the *opposite* side to great *costs* and *trouble*, and frequently *great delay*; and they *lose* their *suit*; I *always* order the *master* to draw up the *whole* costs incurred on the *other* side by such *unreasonable* conduct; as I remember I *did first* in a case, when they *forced* a witness to come from *Portugal*, to *prove* an *exhibit*. I made the *master* draw the rule, charged with *all* the costs of *bringing* this *evidence*, which the *other* party *might* have *spared* them.

Note, 'This was in a case in which they had *refused* to admit the entries in a *custom-house* book, and *obliged* the officer to quit his own and the *public* business, at the port of *Bristol*, to come up to *town*, to *prove* the entries.

His Lordship ordered the rule to be made that they *show* *cause* why the *custom-house* entries should not be admitted.

Note, As to the case of the west riding of *Yorkshire*, it seems there had been a mistake; and that it was meant to have been directed to his Lordship in his capacity of *judge of assize*, and not in that of *Lord Chief Justice of the King's Bench*.

Double Writs.

NOTE, a writ of *fieri facias* and *capias ad satisfaciendum*, both issued out together, motion to restore the money levied, the body being already discharged.

The

* Qui facit per alium facit per se.

The motion was made by Mr. *Dunning*, on the ground that it was *incompetent* to sue out *two* writs at the *same* time against the *same* person, on the *same* cause. That in such case, a common writ of execution out of this court would draw *all* the consequences of an *extent* out of the *Exchequer*.

Lord *Mansfield* ordered the rule to be made absolute, and observed, they had only asked too little; for they might have asked to set aside *both* writs.

RULE ABSOLUTE.

Judgment.

[249]

MOTION for leave to enter up *judgment* for the *defendant*. Vide the King and Davis.

This was on the question of salvage of a vessel mentioned above. Verdict was given for 130*l.* *conditioned* to wait the event of arbitration: That if the arbitrator should decide the claimant to be entitled to more than 5*l.* then this sum should be in hand, to answer his costs and *damages*; but if the arbitrator should find *no more* than 5*l.* then that plaintiff should pay the costs, and judgment be entered for the defendant. Arbitrator did not find above 5*l.* and judgment was thereon moved for the defendant, *which was granted accordingly*.

Service.

MOTION, that service on the party's clerk in court, should be good service, on suggestion, that he absconded to avoid service. Not granted: But instead thereof, rule granted, that service at his last place of abode shall be good service.

Jackson's Case.

ACTION of trespass against overseers for taking his gelding. They alledged, that by virtue of their office, and in pursuance of a judge's order, they levied satisfaction for a poor's rate, which was the trespass complained.

It was objected on the trial, that by the statute of 24. G. 2. demand should have been made of the perusal of the justice's warrant, and six days neglect or refusal.

Judge

Judge being of the same opinion, plaintiff was non-suited.

In support of the non-suit, that this was a remedial act, and to be construed according to the rule in *Heydon's case*, so as to suppress the mischief, and advance the remedy.

[250]

That the mischief was, that justices were often ensnared by surprize on some little inadvertency into which they had fallen; that the remedy was, giving them a power to rectify that inaccuracy or mistake; so as neither the person affected by it might suffer, nor the justice be vexatiously harrassed.

That in order to this, notice is required by the statute to give the party a power of tendering amends, bringing money into court, or pleading as he should be advised.

Vide 24.

G. 2. c. 44.

A mente
legislato-
rum.

That by sec. 6. Constables and headboroughs are likewise not to be proceeded against, without demand of perusal of the warrant: That churchwardens and overseers are within the remedy; that after constables, headboroughs is added by the statute, or other officer.

A verbis.

That perhaps it would be contended officers ejusdem generis were meant; that however in a remedial act, the churchwardens and overseers were not to be excluded, who had a principal need of the just protection of the act.

A simili.

That farther, they are acting under the order of the justices, and in behalf and aid of justice.

That both by the spirit therefore, and letter of the act, the churchwardens and overseers are protected.

A statutis
in pari ma-
teriâ.

On the same side, that by the statute of 4 of King *James* c. 5. the churchwardens were not protected; that the 21 of *James* was provided for their benefit as far as that statute extends.

That the statute of 24 G. 2. was remedially provided for such officers as are not taken notice of in either of the former acts.

That the justices have power by warrant to issue out distress and levy the poor's rate; that these officers acted regularly, and as they were bound to act.

That the plaintiff was not without remedy, for he might have had a replevin. That there had been a case in the Common Pleas where the collector had been construed an officer within the statute, before Lord Chief Justice *Wilmut*; the same in effect as in this case.

It was argued from the reason of the act, that it was necessary to give protection as fully as might be to officers concerned in the maintenance and regulation of the poor.

Ab incon-
venienti.

On the 43 of *Eiz.* he is liable to an indictment if he does not execute the precept.

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27 G. 2. c. 20. On an act for the more easy and effectual [251]
proceeding on distress. Clause, that the officer executing
such warrant shall deduct reasonable charges, &c. and these
general words, comprehend officers of all descriptions who
are empowered to execute the warrant, and as far as the act
under the justices order: Churchwardens and overseers are
officers ejusdem generis, with constables and headboroughs.*
And why, might not the prerogative bounty of the legis-
lature extend farther relief and remedy upon occasion seen
than had been done by the more ancient statutes, before
that occasion was seen and apprehended?

On the other side, that by the 43 Eliz. the discretionary
power as to the poor's rate, is not in the justices of peace
but in the parish officers; churchwardens and overseers
shall proceed by precept from the justice; that therefore,
the justice is obliged, whatever he might think, to grant such
warrant or precept. That the 24 G. 2. is provided in case
the justice does wrong; how can he do wrong here, where he
has no discretionary power? "Other person acting by his
"order, or in his aid" does too extend to parish officers?
Then, that an action is to be brought against a constable,
without making the justice a party. Upon very good rea-
son, 'tis presumed, that it may be seen where the fault lies.
But that here if the rule were quashed an action would lie
against the justice, who yet cannot be in fault.

That the contest between the overseers and the plaintiff
was, whether his horse was taken within the parish to which
the overseers belonged.

Lord Mansfield—There is no such thing in the case, it
never came into question, nor is reserved on the case. Ex-
pressly on the report the question is only "whether the
"overseers are within the 24 of G. 2." It never was made
a question, as I understand in the report, whether they
acted pursuant to their warrant.

Objection: That the judge should not have nonsuited
till proof that B. the place where the horse was taken, lay
within the parish.

Lord Mansfield—If they exceeded their warrant there's
an end of the statute; [for the statute was made to protect
those who acted under warrant: not those who acted with-
out.]

Mr. Cox said that he was in the case, and contended that
the overseers were not within the statute; the judge called
U for

* Quando duo jura concurrunt in eadem persona idem est ac si essent in
diversis.

[252] for the act and pronounced on the words of that “ they “ clearly were;” and that accordingly it was a clear nonsuit.

Lord *Mansfield*—They are certainly within the act of the 24 G. 2. and if the doubt had been on the other point, he would have called for the justices warrant.

Mr. *Davenport* however endeavoured to go on the same grounds as Mr. *Cox*, to shew the overseers and churchwardens not within the act.

Lord *Mansfield*—The only question is “ whether overseers are within the 24 G. 2.”

No justice is compelled to grant an illegal warrant; and every legal warrant he is bound to grant.

The warrant is the authority under which the overseers act. To extend the benefit of the statute of *James*, was the intent of the statute 24 G. 2. and that all officers acting under a justice’s warrant were included by it. If they had distrained out of the parish it would have been no protection.

The judges *Aston* and *Ashurst* were of the same opinion, as to the clearness of the case and the effect of the act.

The rule moved was to shew cause on a special case, reserved at the assizes, why the nonsuit should not be set aside.

RULE DISCHARGED.

Bail.

ON exception to bail because they were three in the notice; the court was of opinion the exception was not good, and that the notice was good though three were mentioned, provided they could all justify.

Affault.

MOTION to dispense with personal appearance of defendant, convicted of an assault.

The court said, it was not to be done for asking; however the rule was taken by consent, the clerk in court undertaking in the usual manner.

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Information.

MOTION for an information against diverse inhabitants of the town of *Dover*, for assembling with beat of drum, making a great riot in the town, attacking of the constables, attacking one of the magistrates, threatening

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ening to make a *Brentford* election of it: and that they obstructed the mayor in attempting to read the riot act.

Mr. Justice *Aston*—If they continued without dispersing an hour, after the riot act being read, 'tis within the statute, and we can't proceed by way of information; however we will not intend it, unless it appears.

Letters of Administration.

MOTION for a rule to shew cause why an extract from the Consistory Court, should not be sufficient oyer of letters of administration.

The suggestion, on which this rule to shew cause was obtained, was that the party who demanded oyer of these letters had made the other drunk, and picked his pocket of them.

RULE to shew CAUSE.

Sheriff,

SHALL not be entitled to poundage if judgment irregular.

Latitat.

ON the first process on latitat, personal service cannot be dispensed with; to allow otherwise, would be to repeal all the acts relative to outlawries; the very nature of the writ supposes the party will hide himself. *

On a Motion for a Mandamus to admit Mr. Webber, a Residentiary Canon of the Church of Chichester.

Constitution stated.

A DEAN and four canons residentiary, who are to elect a residentiary canon on vacancy of any of the number.

That by the rules and custom of the church he who has [254] the majority of votes in his favour shall be elected.

That Mr. *Webber* had two votes; the dean for Doctor *Pettiwarth*; and the third canon for another gentleman;

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so that Mr. *Webber* had the majority as against either of the other two candidates.

That in all common corporation elections, that in elections for members of parliament, the major part with respect to the other candidates is sufficient.

Local constitutions were set up against this general custom, viz. a bye law the 15 of *October* 1573. No one shall be elected a residentiary canon unless he have the good will of the dean; and have also the majority of the canons besides the dean.

That the church of *Chichester* is a very ancient institution; one of the most ancient.

In reply to this—that no former institution is stated before this bye law, though the church of *Chichester* be so ancient; that if there are any bye laws to govern a chapter it must be by the visitor, exercising his visitatorial power.

It is stated as an ordinance made by the dean and chapter, and confirmed by the bishop; negatively it appears therefore, not exercising his visitatorial power. It does not appear the custom of elections has agreed with this bye law. The dean is never named in the registering of these elections.

The dean indeed says, he believes the custom has been in favour of the negative voice of the dean; but he assigns no reason.

The two canons for Mr. *Webber* speak as positively to the contrary.

That by the statute of *H. 8.* the bye law, if it were ever so good originally, it could not stand.

That the canons have always declined bringing this question before a temporal court.

That by the statute 33 *H. 8. c. 27. anno. 1541.* it is provided albeit, that whereas all leases made by dean or warden have as good an effect as if the whole body had assented; yet by peculiar customs and local institutions the same were not good by any one, or more, dissenting; that to establish an uniform reason and conformity universally, such dissent of any one of the body, or more, shall not hinder the making of such lease.

[255]

That the reason assigned by Serjeant *Burland*, that it was designed to make sessions of ecclesiastical bodies easier was allowed; that this reason so assigned and allowed was against the dean, for that the dean having a negative voice would obstruct and not facilitate, and would not be introducing the uniform reason of the common law.

That

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That as to the point, that by common law he must have the majority of the whole body, this is not a question of votes upon a single subject, as granting leases or the like; but it is a case where the choice splits itself amongst several candidates: That in such case he who has the majority with respect to the others, has a sufficient majority by common law, to which this statute of *H. 8.* meant to reduce all elections.

That before 1723 the custom was not according to the old bye law of 1573; that the decree of 1723 provides that no single person as had before been used should elect separately, and that two months notice should be given of any vacancy, to prevent prejudice to the rights of the rest: That if he does otherwise he shall be guilty of breach of trust, and be dealt with according to law.

Lord *Mansfield* asked, whether there was any instance either way.

Mr. *Bearcroft* said, there was one instance in which the bishop not being able to decide, decreed the competitors to decide between them. *

* This decree would have been somewhat *novi generis* at common law.

Evidence of the death of Mr. *Trevigan* the precedent residentiary, and that the dean and chapter met in the chapter house of the aforesaid church of *Chichester* capitularly assembled; and that then and there they proceeded to election of a residentiary to supply the said vacancy: Due notice having been given of such assembly to be held, and that the votes were as hath been stated above. Whereupon, Mr. *Webber* humbly submits it to the court that he was duly elected, and accordingly prays a mandamus may be directed to the dean to admit him; that he applied to the dean to admit him, who absolutely refused, and would assign no reason. That the deponent is ignorant of the statutes and constitutions of the said church; but that he believes the refusal to admit him was founded on a certain obsolete statute or bye law, which gives a *negative* voice to the dean.

Order of 1723. In domo capitulari coram reverendo [256] viro Thoma Sherlock decano.

Lord *Mansfield*—I see the bishop of *London* (*Sherlock*) was the dean, who knew as much of the canon law,* and a great deal of the common law, as any man.

The

* He was originally bred and, I believe, called to the bar; and the traces of that profession seem very evident in the clearness, closeness, and method, with which he has arranged his arguments, and his manner of discussing

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The order stated: That “whereas the presence of the
“ whole body had been not necessary; and that one or two
“ had been used to proceed to election; that henceforth no
“ man shall be elected without two months notice, or with
“ less than two canons present: Proviso, that this shall
“ not extend to elections made sooner by the dean and
“ whole body, or in which the absent members shall give
“ their consent in writing.”

The dean of *Chichester* made affidavit, that orders had usually been made by the dean and chapter, and confirmed by the bishop.

He then states the order or statute of 1573, “that the
“ consent of the major part besides the dean shall be necessary:” And farther sets forth that neither he nor the Reverend Mr. *Hurd*, who voted for Mr. *Miller*, gave consent to the election of Mr. *Webber*.

The Reverend Mr. *Franklin*, who voted for Mr. *Webber*, states the same order or bye law in his affidavit; and farther states, that it does not appear by the book or otherwise that this bye law, order or decree, has been put into execution by giving the dean a negative.

That they had appeared always to go by the rules of common law, which gives the election to him who is chosen by the major part, with respect to the rest.

[257] Farther joint affidavit, by the two voters for Mr. *Webber*, “that the order had never been registered; that it was
“ never referred to in the acts of the dean and chapter.”

A case appeared from the books where the dean and one canon voted for one candidate, and two canons for another; and on reference to the bishop it was appointed “that there be five canons pro hac vice, and two residentiaries; which said two were to divide the profits between them; and that the senior be first admitted,

In

culsing and weighing evidence, particularly in his proofs of the resurrection. I do not mean that this knowledge is not visible in the professions of theology, and of the other liberal professions, arts and sciences; but I conceive it is peculiarly forensic, and no where more striking than in *Sherlock*, who thus became an honour to two professions by a very rare and eminent felicity, and I hope it will shew there is more of amity and mutual connection and support between the two professions than is usually supposed. And that *Themis* furnishes no bad arms for piety and truth; and that there is no part of liberal and useful knowledge from which the study of the law does not borrow, and to which it does not lend, ornament and assistance.

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In support of the rule, Serjeant *Glynn*—The question is not whether Mr. *Webber* is entitled to a *mandamus*; but in the nature of an appeal to the parties, whether he is not duly elected?

That he had the common law majority in his favour. Objection, that he should have the canon law majority; and also the consent of the *Dean*.

As to the institution of 1573, it was before doubted, whether it was a bye-law, or part of the original statute; it now appears to be a bye-law. It has not the seal of the church, nor the episcopal seal: Therefore it is defective, for want of being authenticated either by the church or the bishop.

It seems, that the bye-law, by some mistake, was never either confirmed or rejected by the society.

The bishop's consent was never necessary to a bye-law, if good in itself, but the dean and chapter are sufficient.

As to the particular apprehensions of particular members, the dean would support it by usage since it wants usage; but it is only on suggestion: He gives no instance.

That the order of 1723 speaks not of majority; speaks nothing of a negative voice, though by so learned and laborious a man, and of no great facility in giving up a right of office, as *Sherlock*.

That they had considered themselves as governed by the same rules as a lay corporation.

That before the bye-law, the obvious rule, that a majority in respect of the other candidates is sufficient, obtained, as at common law; that the bye-law is void, as repugnant to their original constitution; and as against the statute of *H. 8.* and introducing greater difficulties than before the statute.

That the act professes to reduce the right of ecclesiastical [258] elections to common law: That it has been objected, there is no standing rule of elections at common law, but the appointment of the founder; but the statute expressly extends to take away what it considers as an inconvenience, and provides that there shall be no negative voice. Therefore the negative of the dean is void; and as to the consent of the majority of the whole, required by the order, it is required against the rules of common law, which the statute makes the standard, against the constitution, against the usage, of the church of *Chichester*.

Lord *Mansfield* asked, whether they had a copy of the statute of 1573.

They

They said, they had no full copy, and Lord Mansfield took notice, that the copy before the court was only a notarial copy, and said the indorsement "original statute of the church of *Chichester*," is certainly, I think, a very modern hand; and that the names subscribed are all in one hand.

Serjeant *Kempe* argued on Sir *Salisbury Cotton's* case, 53 *Strange*; which was, by the charter of *Denbigh* there are two bailiffs, two aldermen, and twenty-five capital burgeses; and by the charter, if a capital burges die, or be removed, it shall be lawful for the bailiff, aldermen, and capital burgeses, or the major part, quorum unum ballivorum & unum aldermannorum duo esse volumus, to elect another. Determined, the presence only of one alderman and one bailiff necessary; and that they have no negative voice.

That here the bye-law requiring a majority, contrary to the common law, statute and usage, and to the prejudice of a third person, was void.

Mr. *Dunning*—That the institution states, that before the members used to proceed *pari vote*, which excludes a dissenting voice.

That in 1687 they repeal the bye-law of 1574, which was nearly to the same effect, on a different subject, as that of 1573, and only a year later; and that therefore, it seemed, that at that time the bye-law of 1573 was either repealed, or had repealed itself by disuse.

In 1723, it seems, that a single person was held sufficient by the society to do a capitular act.

[259] It is true, that livings in the gift of the church are spoken of in the enacting part of that order, and not in express words, "residential canons:" But the preamble is as large as possible, and it follows in *pari gradu*.

As to the idea which the learned Serjeant (Serjeant *Burton*) suggested, of the bishop of *Chichester* being visitor, I hope it's not true: For then, I am afraid, we shall be told, that we have nothing to do here; but I take it, he acted as a friend.

Lord *Mansfield*—There is no visitor at *Chichester*, in the idea which you suggest, as in the two universities.

Mr. *Lee* began with observing that it was contended, that by the common law, a majority of the whole body was required; and was going to cite cases to the contrary: But Lord *Mansfield* stopped him, and said, they don't say there is any such rule by common law, but by canon law. The counsel who made that observation always goes upon right grounds.

Mr. *Lee* proceeded, that by virtue of the statute, the negative was at least taken away, in all cases, except where the original institution of the founder had given it.

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Burn says, (I cite reasons rather than authority) that he thought the intent of the statute was to take away the negative voice.

Note, in a former part of the argument, the case de capitulariter congregatis, in Sir *John Davis's Reports*, was cited, which is highly worth reading.

Lord Mansfield—I take it, that at every meeting for a residentiary the dean has voted. It is expressly said, that it was so upon the last election.

The church clerk was asked by his Lordship, whether the dean and residentiaries were used to meet; and whether the dean voted? He answered yes; always.

Lord Mansfield—Then it is apparent, that the dean hath not a negative; for else the canons would elect, and present to the dean.

On the other side, contended, that either in general the majority of the whole body was required, or else that Mr. *Webber* was at least excluded by the peculiar institution.

That as there was no original statute to regulate the election, it must be understood, that either by usage or bye-law, the election in behalf of Dr. *Pettiwarth* is good. That the dean is an elector, and must be present, and either nominate or assent.

That as to the objection, that the law is void in itself; void, [260] because it does not appear regularly formed; that it's bad by common law; bad by being obsolete; and bad by statute.

Answer, That it is a law of two hundred years standing, and presented by an authenticated copy; and that it did not appear, that in any lay corporation the seal is required to authenticate a bye-law: That as to being void in itself, it is certain it would have been good by a founder before the statute; * and that the statute did not take away the negative voice, if given by a founder: And that if it were a bye-law made before the statute, not contrary to the original constitution, it would be as good as if made by the founder.

As to it's being obsolete, that the entries before the year 1735 don't stand contrary to the law, that when they repealed the statute of 1574 by not repealing that of the preceding year, they confirmed it. At least, that and the other being both in the same book, and so close together, they could not overlook it.

That it would not be bad, by not agreeing in all points with the ordinary course of common law, in which however,

* The order of 1573 is clearly thirty-two years after the statute; but I think it was contended 1573 was in support or affirmance of some more ancient custom.

ever, there were many diversities, unless it could be proved bad for some of the foregoing reasons.

[Lord *Mansfield*—It has been taken from a roll; it does appear hardly to have been in any book.]

That as to the order of 1723, it is not that a single canon shall elect; but it is that one or two shall not elect in the absence of the rest, without notice.

That it is submitted to the court, that it rather affirms the principle of a majority of the whole body being necessary, by saying nothing of any inconvenience arising.

Lord *Mansfield*—I doubt the words are stronger.

The words were admitted to be very strong; but it was said, they supposed an absurdity, that could not happen, either by statute or common law; that one canon, in the absence of the rest, without notice, or regular meeting, should elect a residentiary.

[261] That the case in 1735 was a matter that could never come in question; it was no election: The four were divided into equal numbers; two on one side, and two on the other.

That it was probably a reference in compliment to the bishop.

Lord *Mansfield* observed upon it, that if the dean claimed a casting voice at that time, then the order of 1573 was set aside, which excluded the idea of a casting voice.

In continuation of the argument, it was said, that the mischief provided against by the act was, that the dissent of any one member, not being the dean, or head, would be a prevention. As to the head of the corporation, they were not in fear of procuring his assent; but the fear was, lest a single opponent amongst the whole body should obstruct the whole. And why should the universities have a negative voice, which are merely lay corporations, if the negative voice was to be taken away, in the case of dean and chapter, which are strictly an ecclesiastical jurisdiction, and governed more immediately by the canon law, which gives such a negative?

The case was ordered to stand over for the second day of peremptories in the next term.

Whereupon postea, to writ, in the next term, on looking into the books, &c. of the corporation, and considering the case, the court granted the mandamus in favour of Mr. *Webber*.

RULE ABSOLUTE FOR THE MANDAMUS.

Trespass.

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Trespass.

ACTION brought in the shape of trespass. On hearing the nature of the case, Lord *Mansfield* said could have brought an action for money had and received, and added, You know the trespass may be waived, been solemnly determined. Vide *Feltham and Terry*

Immaterial Counts.

MOTION to strike out the immaterial parts of the declaration, with costs. It was an action of escape from the sheriff.

to shew cause, why it should not be referred to the [262] to expunge the unnecessary and immaterial parts, with costs.

It is always the practice to grant this rule, in all where the declaration is materially superfluous or irrelevant in its parts. And there is a similar practice in every.

Common Pleas, 22 May 1773.

In the Case of General Mostyn.

a motion to enlarge a peremptory rule for going to trial, in this cause, which was an action of false imprisonment, brought against the governor of *Minorca*, by a native.

A suggestion on behalf of the rule was, that a witness called to the defendant in this cause, and on whose behalf the rule had been enlarged before, had been unexpectedly absent, but was now daily expected from *Minorca*.

It was urged against the rule, that this witness was in the country when the general was there; that he might have brought him with him; that he had once already enlarged the rule; and that the rule was peremptory.

On the other side, that general *Mostyn* was in no default in bringing the witness; that the court having granted the peremptory rule in his favour, on account of the necessity of the witness, would grant this farther enlargement, the witness being still necessary. That the defendant would risque ten pounds damages, and, what was of still more consequence,

consequence, reputation, if he went to trial without him. That the plaintiff would not suffer, as judgment might be had as early of next term as they pleased, they being ready to try on the second sittings of the term; and that if they tried the issue the sittings after this, they could not have judgment before the fourth of the next term.

That it was true rules once enlarged before should not be granted, where the person making request had been the cause of the delay, by not exercising his proper power and using the occasion in his hand; but not when the party applying was not guilty of neglect, and where the fact or cause of necessity subsisted, as induced the court first to grant the rule. That the promotion of justice was what must govern the court in this, as in all other subjects of determination before them; that surprize and delay were the two evils to be avoided, and that the defendant was ready to give them all possible security against either.

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A peremptory rule always means so far peremptory, as may consist with justice.

The COURT granted the RULE PEREMPTORY, to go to trial the second sittings in the next term, explaining the meaning of peremptory to be unless the defendant hindered by tempest, or some inevitable accident from producing his witnesses. *

Bail.

AN Attorney is not bail.

Riens per Descent.

Campbell's Case.

3 W. and M. c. 14. Heir may plead riens per descent, and the jury shall enquire into the value of the lands descend. Vide Palmer v. Jones. 1 Vern. 134.

ACTION against executor, charging him with assets. *Riens per descent* pleaded. It appeared in evidence that the plaintiff had a shilling from his ancestor; and was contended that for his false plea, he should be charged with the whole debt.

Lord Mansfield—I remember a case in which I was counsel for the Duke of Portland, in which the sword-bla company came for 200,000l. assets; there was a great apprehension lest there should have been some small circumstance to catch at. It would have been a terrible injustice to charge on account of a false plea of some trifling matter.

* Lex neminem cogit ad impossibilia.

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by mistake of inadvertency, for the whole debt: As I remember in the chancery cases, where an executor was charged with assets, by reason of the repair of a chimney-back, about the value of 10d.

In the case now before the court all the land was devised away; but the devise being void by the statute of fraudulent devises, it was said, it went to the heir by descent with respect of creditors: There was a bequest of a shilling to the heir, which he never received.

Lord *Mansfield* said, there never was an idea that a false plea of *riens per descent*, in such an instance as this, should charge the party with the whole debt. That it would be very unreasonable to charge him, on such a ground, in such a manner where the party took in reality nothing by descent.

Mr. *Dunning*—This is the case of a disinherited heir at law, who comes in as by way of form only, that complete justice may be done to the creditors.

On *Campbell's* engaging that he would not obstruct the plaintiff, the plaintiff engaged that he would pay the costs. But he says *Campbell's* pleading *riens per descent* has been an obstruction to him. Now *Campbell* can't plead otherwise according to the substantial truth of the case. The plaintiff will have his claim on the assets which may hereafter arise, and there can be no inconvenience to the plaintiff.

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Lord *Mansfield*—I wish you had a case of authority, Mr. *Dunning*, to maintain that where a very slight devise, however inconsiderable, came to the heir, it shall not be assets to charge him with by descent. I asked Mr. *Buller*, there being devises in the will which reached to the whole estate, how the assets came to descend. Mr. *Buller* replied, that by the statute the devise was void, and therefore there were assets, because the lands descended. But I doubt whether it does descend. The will is void with respect to creditors; but supposing there were creditors to 300l. devise to 700l. the will would stand as to the surplus. Therefore the devise is void quoad the creditors only, which does not appear to me to make descent of the lands.

Mr. *Buller*—I thought the defendant would have pleaded *riens per descent* except the lands in the devise; but now he has put us to trial upon a false plea.

Mr. Justice *Asbhurst* seemed to recognize this ground; and said, he was afraid the devise must be charged with the costs.

Lord

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Lord *Mansfield*—What is the practice of the statute?

Mr. *Wallace* seemed to say, that the practice was, that the heir pleaded nothing by descent; and that the replication was—"descended for the creditors."

Lord *Mansfield*—I find the words of the statute stronger than I thought, and stated; for the statute not only says "such devise shall be void as against creditors;" but "against them only."

Mr. Justice *Abbott*—If the statute had been against the devise in general, then the plea of *riens per descent* would not have been good. But in this they should have found for the defendant.

Lord *Mansfield*—It seems they had not read the statute, for there is a proviso that the heir may plead *riens per descent*, that the plaintiff may reply to that and a jury may enquire, and if there be lands shall find the value. But upon a *nihil dicit* there shall be debt and damages.

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RULE ABSOLUTE to set aside the *capias* and money to be returned.

Mr. Justice *Astle* said, If an estate sold for a great deal more than expected the devise is void, as against creditors, yet the lands shall not descend.

Notice.

14 G. 2. c.
17. Motion
on the sta-
tute held to
be notice.

IT seems that on a motion, on the fourteenth of his late Majesty for judgment as in case of a nonsuit, the motion itself upon the statute shall be held to be notice. And so, I have since heard from Mr. *Cowper*, is the practice.

Rule.

Regula ge-
neralis.

WHEN a rule is made absolute you can't answer to it, but move to have it discharged; for otherwise you might as well on a writ of execution on a judgment go into the merits of the cause.

Costs.

Easter Term, 13 Geo. 3. K. B.

Costs.

23 G. 2. c. 33. f. 19.

“ **T**HAT where the jury find damages under 40s. the
“ plaintiff shall have no costs, but the defendant
“ double costs, unless the judge shall certify that the free-
“ hold principally came in question, or that an act of bank-
“ ruptcy principally came in question:” The act of bank-
ruptcy must be so in question as to be, to the satisfaction
of the court, proved principally in question.

Trinity

Trinity Term,

13 Geo. 3. 1773. K. B.

IN the case of the Residentiary Canonry of *Chichester*, I am informed (for I was absent the first six days of the term, by reason of an accidental blow, from which I providentially escaped with life;) that the two grounds on which the court decided were—first, that the negative voice of the dean could not be supported by the bye law; second, that by the usage of the common law, which seemed to the court to have governed the elections of the church of *Chichester*, a majority of the whole body was not necessary, but only a majority with respect of the other candidates.

Notice of Ejectment.

ON a motion for a rule to shew cause why sticking up the notice on the door of the house should not be deemed good service, no person being found in the house to whom to deliver the notice; the court seemed to think, that a vacant possession must first be proved.

Collins v.
Dunch.

Burr. 1116. was cited, that if no body could be found they might stick it upon the door.

Lord *Mansfield*—There is no difficulty, except as to the form.

The master was consulted.

On the whole the court doubted, and it was ordered to be moved the next day.

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Campbell against Vaughan.

On Error from Ireland.

ON a question, Whether estate for life, or in fee.

Special verdict. That on the fourth of *February* 1734, testator died, having made his will the same day.

“ Devis

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“ Devise, that my brother have my estate during life ;
“ and, after his decease, to his first and other sons ; the
“ elder to be preferred before the younger. And, for
“ want of such issue, my nephew *Barlow* and niece *Cathe-*
“ *rine Fisher* take share and share alike, during life ; re-
“ mainder to their issue male ; remainder to the heirs of
“ my nephew *Barlow Scot* for ever.”

The brother died without issue. The defendant claims under the brother ; the plaintiff under the nephew.

Fine levied ; the remainder man entered, to defeat the operation of the fine.

The court of King's Bench in *Ireland* determined the estate, that the testator's brother, under whom the defendant claimed, took only an estate for life.

It was contended, that the plain intent was to convey an estate tail to his brother's issue.

That as this could not be to the sons as purchasers, for want of words of limitation, therefore it could only operate as an inheritance, by construing an estate to them, thro' the father, the brother of the testator.

An annuity is limited to the heir at law, to him and his heirs male, with liberty to distrain on default of payment. This annuity is limited to him and his heirs male, “ till he
“ come into possession of my estate,” says testator, in such manner as aforesaid. Then follows limitation to nephew and nieces, for life respectively ; then after their decease, to the first and every other son, the elder to be always preferred before the younger.

Contended, that he first disposed of the moiety for life, and confining the argument to the nephew, as whatever is truly inferred of him will apply equally to the nieces.—
First, there is a life estate to the nephew ; then to the first [268]
and every other son, share and share alike, without express words of limitation. It was meant the sons should take an estate of inheritance : The words follow, “ And for want
“ of such issue, remainder over.” Now the nephew is found to be the heir at law, in equal degree at least of affection with the brother. Now if the words “ for want of
“ such issue,” had stood, without those to the sons, they would have created an estate tail by implication to the nephew : Therefore, here it must be interpreted an estate of inheritance to the sons, whom he meant to take, it being designed for the sons of the nephew, as before for the sons of the brother. Then, whether cross remainders ? Now whatever applies to the nephew must equally apply to the

the niece. The words "for want of such issue male," must apply to both (in the same sense.) The remainder cannot take place till the limitations, both to nephew and nieces, and their issue respectively, be spent. And by the following clause, "Then my will and meaning is, for want of such issue, that all my estate, as aforesaid, shall go to my nephew, *Barlow Scot.*"

Therefore the nephew had a complete and entire estate in him when he levied the fine, and suffered the recovery. An annuity is given to the nephew, *J. Barlow*, of inheritance to him, till he shall come into possession: No such annuity is given to *B. S.* Something may be argued from the difference of expression; but the will is so inaccurate, nothing, perhaps, can be well collected from that. He has limited an annuity plainly as to be in tail, but yet without mentioning time of payment, time of distress, whether rent annual, or no. I shall cite but two cases, *Robinson and Robinson*.

[Here Lord *Mansfield* interposed—Are they in the same words? You have great luck, if you have found any such; if not, you had better confine yourself to the general argument; for it depends on the precise words.]

Mr. Serjeant *Walker*—I contend before your Lordship in favour of the plaintiff in error: (Defendant in ejectment) First, that *J. Barlow* and *Catherine Fisher* took an estate only for life. It is expressly limited during the time of their respective lives; and, after their decease, to their heirs male, share and share alike; the elder to be preferred before the younger. And, for want of such issue male, then remainder over to *Barlow Scot.* I contend, no such general limitation has ever been interpreted a remainder over in tail. Now he can't have said more clearly to the nephew and nieces for life only? the sons to take as purchasers. He then gives an annuity very strongly to *Barlow* and his heirs, till he comes into possession, which must be after his decease. It's said, he meant an estate tail, when he said heirs male, and meant the same thing therefore when he said sons. I apprehend, the argument turns directly contrary.

[269] I have no doubt, every ignorant man, when he uses the words heirs male, or issue male, means precisely the same as when he says sons, and no more; but in the one case, the technical words over-rule.

In the case of *Evans and Ashley*, before your Lordship,
your

your Lordship supplied the words, which, probably, were wanting here, if an estate tail were meant to the sons. There was a remainder to unborn sons, after an express limitation in tail to the sons born of the same parents, without the words to the heirs male, which your Lordship supplied from the intent, and which would here make the conveyance perfect.

Lomax and Hatfield, before Lord *Hardwicke*. The testator had a son, who had disobliged him, and four daughters. He made a limitation for life, dependent on a trust, to the son, when he should attain the age of forty; remainder to the first and every other son; and, for want of such issue, remainder over. [It seems Lord *Hardwicke* did not determine.]

I shall not cite the case of *Corrington and Hellier*, and only a very few others. *Humberston and Humberston*.

[Lord *Mansfield*—That was quite upon another principle; being upon a succession of estate for life. As to the case of *Robinson and Robinson*, it was very different; the estate being limited to one son; that son died, and another was born. Question not only, Whether he should take by purchase, but whether he should take at all; but from the intent of the estate continuing in the male line, the word "son" was taken as nomen collectivum, extending to all the heirs male.]

If your Lordship should think there was no estate tail in the nephew and nieces, then the recovery was not good; if your Lordship should think otherwise, I hope, you will not understand words so bare as capable of creating cross remainders. The words "share and share alike," are as strong as if he had said, "tenants in common;" the words "respectively" imply separate estates, and therefore a moiety.

Serjeant *Walker*—Mr. *Mansfield* has rested his whole argument on one point only; and it was the interest of his client. I have gone on all the circumstances of the will. I have not said that in all cases where the ancestor has an estate for life, the sons can't take an estate of inheritance; but that there is no appearance from the words here, that they can take without referring to the ancestor. In the first disposition, it's for want of such issue of his brother. In the second disposition, the words "for want of such issue" can admit of no other construction. All the cases cited by Mr. *Mansfield* are where there is a regular estate tail but not carried on far enough, whether that defect can be supplied.

plied. This will be an answer to the case of *Evans* and *Astley*; what governed was the express limitation in part, and a manifest intention to carry it on farther; of such an intent the direction to take the arms and the name of the family was a strong implication. *Lomax* and *Hatfield*. Here they say, the son was on the face of the will in displeasure with the father; therefore he was resolved the estate should not be vested in him, but derived from him to his heirs; but, there being heirs capable to take by purchase, they only carried the inheritance on farther, according to the plain intent. Whether there be cross remainders nothing can be plainer. I don't rest on the word "all," and yet, what can be stronger? No estate is to go over, till all can go over, they never can die without issue, till failure of issue of both, because they are brother and sister.

Lord *Mansfield*—The question is, whether *J. Barlow* the nephew took an estate for life, or an estate in tail. When a will is so untechnical and inaccurate as this, 'tis very dangerous to lay great stress on monosyllables. The best rule therefore, in this and every case upon wills, is to find the general intent; and then, as much as grammar and language will permit, to interpret particular expressions accordingly. Here plainly there are different stocks whom he means to take.

As it was said in *Corrington v. Hellier*, 'tis according to the common way. Limitation to the first and other sons, the elder to be preferred before the younger, are the very technical words; then follow, and for want of issue male of *R. Barlow* [the brother] which is inaccurate, but the meaning is clear, the sons are to take the elder preferred before the younger; does this only extend to the line of sons living? The manifest intent was, the heirs male of those sons. And if I give the ancestor an estate tail, then I defeat the express words for he gives it to him expressly for life; intending evidently, that no body should defeat the estate tail in the common way, the ancestor having it in him. Then, as to the limitation to *J. Barlow* and *C. Fisher*, why does it hold that the sons can't take but thro' the ancestor? And what does issue male mean? Plainly refers to what went before, but rejecting only the word *such* 'tis very manifest, and even if that word were retained (this is not indeed before the court) I should say, the effect would only be that the sons should take for life, without any alteration as to the ancestors. I am therefore clear

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of opinion, that *J. Barlow* only took for life. The consequence is judgment affirmed.

ON the statute 30 G. 2. c. 24. persons being brought [271] up who were in custody, on a charge of obtaining money under false pretences; it had appeared that they had sold some goods to a customer who not liking them, they made a conditional sale to another person: If the person who brought this prosecution should not take them. The money was not returned, because the goods were not absolutely disposed of.

Lord *Mansfield* observed, that it was surprizing how many abuses had been made of this statute.

Indictment.

IT was said, and the master seemed to think so, that Vide 4 Bur. 983—4. two persons could not be indicted for an assault against two, in one indictment: But Mr. Justice *Aston* said, this opinion had been held in *The King v. Clendon*, but that case had been over ruled, and the law was now held to be otherwise.

Common Pleas.

Parker against Marshal.

ON an application to oblige Mr. *Marsbal*, an attorney of the court, to deliver up the court rolls of the manor of *Wandsworth* and *Battersea* belonging to Lord *Spencer*.

Lord *Spencer* appointed Mr. *Sutton* his steward; Mr. *Sutton* appointed Mr. *Marsbal* his deputy; and afterwards Mr. *Sutton* resigned. Lord *Spencer* appointed Mr. *Parker* his steward; and Mr. *Marsbal* refused to give up the court rolls into the hands of Mr. *Parker*.

Strange and *How* was cited, in which, mortgage deeds were intrusted by a counsel into the hands of an attorney, and the attorney trusted them with the mortgager, who took up money upon them; the court said, attornies should be compelled to perform their trust.

Another case cited from Serjeant *Wilson's* Reports, where an attorney, *quâ* attorney, was made liable tho' he acted as attorney of another court.

The

[272] The difficulty with the court was, that Mr. *Mars* here acted as deputy and not as attorney.

A case was stated which induced the opinion of the court that a rule to deliver up the rolls might be granted. It was a case in which Lord Chief Justice *Ryder* expressed his opinion, that an attorney sworn of the court gains credit by the means, and is therefore liable to a rule to rectify a misconduct tho' not directly within his office as an attorney.

But it was not thought that there appeared sufficient, on Mr. *Parker's* affidavit, to transfer the possession of the rolls into his hands.

Rule to shew cause why the court rolls of the manors *Wandsworth* and *Battersea* should not be delivered to Lord *Spencer*.

Variance between Writ and Judgment.

IN writ of error the addition was esquire, in the judgment gentleman.

Motion to amend the writ.

Writ of error, whether amendable.

Lord *Mansfield*—You never amend a writ of error; you must bring a new one. Is not so?

Which was admitted. But Mr. *Buller* contended, addition was not necessary.

Lord *Mansfield*—No writ.

Note, Addition may be in some cases unnecessary: But if it is used, the party mistakes it at his peril; for I think, it has been determined, that it is never so plussage.

Afterwards, however, on looking into the statute 5 G. c. 13. it appeared, that writs of error varying from the record may be amended. And leave to amend was granted accordingly. *Sed vide infra*.

Information.

[273] **M**OTION for leave to file an information against *James Dunn*, an overseer of the poor in the parish of *St. John the Martyr*, for having offered a bribe of 500 to a man, a ring, and the value of a licence to marry a woman. That the man is a pauper of the parish of *St. Michael's*, and a widower, with four children: That the woman is very infirm, and has been in the hospital. It appeared, the offer was made in *June 1772*; but does not shew when the marriage was, except illatively; that about the same

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same time the overseer said, it was a bad thing, and he would not do it again.

COURT—You have staid three terms; it will be a great expence: Go to the GRAND JURY.

Notice of Ejectment.

NOTE, the resolution of the court, with respect to the case of ejectment, mentioned above, turned in favour of sticking it up on the door, there being nobody to be found within. And this was determined on the report of Mr. Cowper, as to the practice.

Common Pleas.

Attachment.

NOT in the nature of an original, as of old imagined; and therefore does not require fifteen days from the date to the return.

IN the court of Chancery, distinction taken notice of between heir apparent and heir presumptive. Heir apparent is he, who, in the course of law, must be heir, if he survives his ancestor, as the eldest son. Heir presumptive is he who has the present presumption in his favour, that he will be heir; but which presumption may be excluded by the intervention of some body who has a nearer title. Thus, a nephew may be heir presumptive, but not heir apparent. Thus, a daughter is heir presumptive, before a son is born, but not heir apparent. The most remote relation of the whole blood may be heir presumptive; but the heir apparent can only be he who, if not disinherited, or dead before his ancestor, must take of course, because it is impossible any other should be nearer, or so near to the inheritance.

Distinction
between
heir pre-
sumptive
and heir
apparent.

— Parkes.

ON a motion to discharge defendant out of custody, for want of being charged in execution within two terms.

The case was, the marshal had two persons in his custody [274]
at the same time, both of the name of *Parker*. And the
rule being, to bring the defendant, naming him by his sur-
name

name only, or acknowledge him in custody, the marshal acknowledged *Parkes* to be in his custody, and the plaintiff proceeded regularly, as he thought, to charge the defendant in execution. It happened, that the term before that the defendant had removed himself into the custody of the warden of the Fleet; so that the other *Parkes* had been mistaken in the proceedings for the real defendant.

It was contended, that the marshal not being intentionally wrong, and they having proceeded literally right as to the name, and intentionally right as to the person, though in point of fact they were formally mistaken; that therefore the defendant should not take advantage; and that in a case of *Steward*, if a treaty could have been made out to the satisfaction of the court, they would not have discharged the defendant, though the time had elapsed.

On the other side, it was said, that a treaty and agreement being a waivure on the part of the defendant's self, there was a great difference. And it was said, that all these rules admitted of liberal construction. (Which, however, is not altogether true; nam in gratia delicti faciendi liberalitas; in pœna irrogandâ non item, versatur.)

Lord *Mansfield*—There is no doubt in this case: There must be exceptions to the literal import of every rule. It was to prevent neglect, and the party suffering by that neglect, that the rule was intended. No such thing has happened:—This has been a slip, if I may so say, in the practice of the court, by not inserting the christian name of the defendant: And whether the plaintiff should suffer by this motion, or the marshal, the rule of this court would work monstrous injustice.

This rule is construed very strictly in general; but there are exceptions. Why is an agreement excepted? It is not by the literal words of the rule. Why is an imposition excepted? There is no such exception on the face of the rule.

It was objected, the party would be detained in custody all the long vacation; but this, on the circumstances of the case, it appeared would not happen.

Ungrammatical Words in an Affidavit.

OBJECTION to the words of an affidavit, that they contained no denial.

[275]

The words were, that they, the deponents, nor any of them, never received.

Lord

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Lord *Mansfield* held, that the meaning was apparent; And that if they had received notice, the form of words would never bring them off on an indictment of perjury.

Writ of Error.

THE variance in the writ of error, in the case lately before the court. Lord *Mansfield* took notice, that it was the same to them as if it had been none; for that by the 5 G. 1. c. 13. writs of error, where there was a variance, were to be amended into the court into which they were returnable; which was in this case before the LORDS. in PARLIAMENT, where it would be amended of course. That therefore the jurisdiction of this court had nothing to do with it.

RULE DISCHARGED, as to the amendment of the writ, without costs.

Upon costs applied for, Lord *Mansfield* said, Would you have the court pay them? I am sure, if they are to be paid, it was the court in this case who should have paid them.

Mr. Justice *Aston* this day, being the twenty-first of *June*, gave a CHARGE to the GRAND JURY, stating the importance of their trusts, both to individuals and the public; particularly as to that part which concerned the suppression of disorderly houses, and thereby stopping the first source of the most ignominious and fatal vices.

Action of Debt for double Rent, on the Statute.

TWO hundred and forty pounds claimed, for two year's double rent, as a penalty for overholding premises, at sixty pounds *per annum* in value.

Verdict and judgment stated, that the plaintiff shall recover one hundred and eighty pounds.

Contended, that this being a fixed debt, the plaintiff [276] must recover the whole; or the verdict is found against him for the whole.

Another objection, that the habendum in the lease is from the first of *June*, for three years, and notice to quit is on the first.

Lord

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Lord *Mansfield*—From the first of *June* then is, that on the second of *June* the tenancy begins, and holds to the first; therefore declaration good.

Against this the following case, with another, was stated, *Lewellyn* against *Williams* and others, *Cro. Jac.* term *Mich.* anno octavo, in *B. R.* Ejectment. Lease on the twelfth of *December*. Habendum a primo die. Jury found a lease, dated the first of *December*, (habendum from henceforth) but delivered on the twelfth. Court held, it should be taken from the day of the date, and from henceforth are one, being a computation from the time past; But they said, a lease of the first of *December*, habendum a die datus, ejectment cannot be alledged the same day.

Lord *Mansfield*—The only difference is, you begin from the wrong end; you state a case which relates to the commencement of the term.

As to the other objection, it was likewise dismissed, and it was observed, that the defendant, to the declaration of the plaintiff, pleads nil debet; that is, neither the whole nor any part thereof. By which he puts himself on the jury, to try not only whether the whole be due, but whether any part be due: And therefore they may find, against him for a part.

Third objection, that whereas the jury had found one hundred and eighty pounds, for the double damages of a year and an half expressly, this was an error in the computation. Dismissed also immediately, as being an error of computation in the objector, to suppose this an error in the jury.

Parish of Bething.

A GAINST an order of sessions, by which an order of two justices to collect a separate rate in the tithing of *Newburn*, had been quashed.

The order of the two justices was upon the 13 & 14 *Car.* 2. and upon the ground, that the inhabitants of the tithing were unable to receive any benefit from the statute of *Elizabeth*.

[277] It was argued by Mr. *Dunning*, in support of the order of the two justices, that the 13 & 14 *Car.* 2. provide for the separation of such parishes as, by reason of their largeness, cannot receive benefit from the statute of 43 *Eliz.*

Objection

Objection against the order of sessions, that the parish which the order had considered, had in fact received some benefit, and was therefore not within the statute.

Mr. *Dunning*, on the other hand—That the legislature, if they were applying a remedy to a mischief which did or could exist, must only mean such an one, as where the churchwarden could not conveniently perform his duty with the rest of the parish officers, nor the parish conveniently come at them. For no parish, take it to be as large as to fill a county, or even as large as the kingdom, can have ever been in the state of not receiving the benefit of the 43 of *Eliz.* at all. Taking this to be a meaning that such a parish was meant, as where the churchwardens could not conveniently perform their duty, nor the parish conveniently come at them, that then scarce could there have existed a case, to which this meaning was more applicable than that before the court: For that this is stated to be a little insulated tything, twenty miles distance from the parish. The parish officers can't very conveniently, (performing their duty as they do, without reward, and without any need of increasing the difficulty) they cannot very conveniently go twenty miles to collect; nor the parish so far to attend them.

That the meaning of the order, in saying, the tithing could not conveniently receive the benefit, is explained by the situation of the place, and the only conceivable intendment of the statute.

That even if these words had not been in the order; but they had positively declared, that the tithing could not receive the benefit; there would still have been no ground, upon such declaration, against their order.

That the utmost that can be objected against these words is, that they are unnecessary; for that the statute shews plainly what was considered and provided against. Some parishes, by reason of their situation, could not receive the full benefit of the 43 *Eliz.* and this only was or could be in contemplation, if any thing was meant; and the provision was, that those who, by such circumstances, were in a worse condition than other inhabitants, though it was impossible they could have been totally out of the benefit, should be put on the same footing.

That the proposition, thus maintained, appeared so self-evident, or at least so clear, when entered into, that the only thing that seemed requisite to prove, was, that it had not already been otherwise decided. That there had indeed been

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been several dicta preserved in notes; but that there had been absolutely no solemn decision, nor even any thing militating strongly against this interpretation of the statute. As to the *King* and inhabitants of *St. Giles's* in the fields, that there the determination, though this case had been often agitated, was, that a separation being stated of the inner division of *St. Giles's*, the court said, non constat, this is a new term, and we know of no such division. That something more passed in conversation amongst the judges, but no decision. That the parish of *St. Giles's* is nothing in comparison of that in question, as to extent.

That in the case of *Peeton* and *Westgard* there was no stating that the parish could not receive the benefit; that it appeared for 123 years they had in fact received it. That it is stated there that Lord *Mansfield* said, in his judgment, that “the policy of the statute of *Car. 2.* was bad: That “the districts should rather be enlarged than diminished—“and that inability should have been proved; that none “was proved, but the contrary.” That in the declaration his Lordship was thoroughly justified; for that it appeared they had the full benefit, and had always had it. That as to what was to be inability, the court had at that time no occasion to go into it: And therefore, Mr. *Dunning* said, he presumed it was still open to him to understand this case as not against him; and that it is the only one of any authority. That therefore, he thought himself still at liberty to hope his Lordship's concurrence, to support him in the interpretation of the statute of the 13 & 14 *Car. 2.* so as to make it applicable to what is possible and easily conceivable, instead of what, in his ideas, was by no means either.

That, on these grounds, he begged leave to conclude, there was nothing in the order by which it appeared the justices had been wrong; and then, that he should only ask the usual rule of the court to be applied, that nothing wrong shall be intended against the justices, which does not appear.

That he had omitted to observe, that there is another objection, namely, that a tithing is no word within the description of the statute. That to this he should reply briefly, and content himself with saying, that division, the word used in the case of *St. Giles's*, and in the objection, is (as he doubted not the court would anticipate him in saying) a very vague word; whereas tithing is a very definite one, and must consist of no less than ten houses, with the proper officer.

On

On the other side in support of the order of sessions, by [279] which the order of justices was quashed.

That it is admitted the justices order is proper in other respects; but that there is a question, whether the division was created before or by this order. That it does not appear that the overseers were made to act for this tithing as a separate division; that it was apprehended the two justices ought to have stated this; and that 'till it was done there was no division.

In the case of *Westgard* it was stated, that the parish of Stanhope in the county palatine of *Durham*, had a joint appointment—the money levied by another assessment—that it had four distinct quarters—that it was twenty miles in length, and eight, at a medium, in breadth. After this an order was made to separate this quarter, and removals were made, and appeals from one quarter against another.

That the case was twice solemnly argued. That Lord *Mansfield* declared, that the policy of the statute was mistaken, that the districts should rather be enlarged than diminished. That afterwards his Lordship said, but not as necessary to the decision, that the inability should have appeared.

That Mr. Justice *Wilmot* had said, he was of the same opinion as to the first, and that one hundred and twenty years had proved they were not under inability; and that the subsequent forty years practice could not alter the usage.

That, in the case now before the court, there had been an acquiescence of fifteen years only; in the other of forty.

That Mr. *Dunning* had suggested, there was a difference of opinion about the policy of the statute, but that on the case it appeared, that his Lordship and Lord Chief Justice *Wilmot* both concurred, and that no case was stated in which it was affirmed to be otherwise.

That to prevent uncertainty of settlement, multiplicity of officers, and encrease of expence, the contrary to the policy of that statute would be necessary; for the more you separate parishes, the more you multiply officers, and encrease the burthen of rotation and the difficulties of the poor. That an order of 1758, which had been stated, was a mere order by consent, and as such given up by the counsel, and that there was nothing else to support the order of the justices.

Lord

[280.] Lord *Mansfield*—There cannot be so clear a case. Without entering into the general argument, what was the order of separation? It is a mere nullity. It does not appear there were any overseers appointed; but it appears negatively there were no overseers 'till 1772, which does by no means conclude the court to say there were any appointed, even then.

Mr. Justice *Aston*—There is no need of entering into the question whether the policy of the statute is good, or not; but it must appear clearly, that the parish was not able by reason of its largeness to receive the benefit of the statute of Elizabeth; there is no such thing stated here; there was nothing to create a separation, but a mere order by consent, upon which nothing was then done; nor appears to have been done to this time; it was on a proposal between the owner of this tithing and the parish officer of *Beething*.

As to what was said about the ten houses it does not appear; nor can we infer there were more than ten. And this inconvenience, stated as general, I dare say affected Mr. *Smart*, the owner of the tithing, and perhaps, no body besides.

Curia consensit unanimiter.

RULE made ABSOLUTE to quash the ORDER of JUSTICES, and confirm the ORDER of SESSIONS.

Attorney.

ON a question, whether an attorney might be bail; it seems the objection was held to be restrained to the court in which he was attorney; sed de hoc quero ulterius etsi non immerito videatur.

Penalty.

RULE; never to take out execution for a penalty upon money to be paid by installments; you must never take out execution but upon the money actually due: Therefore the jury often find what is really due. Lord *Mansfield*.

Habeas Corpus.

A Man brought up by habeas corpus, who had been committed for a felony in violently assaulting and robbing *Mary Hill* on the King's Highway. Notice had been served

served on *Mary Hill*, that the court on such a day would be [281] moved, &c. But notice was not served on the committing justice.

The court said this notice was short.

The woman did not appear.

Lord *Mansfield* ordered the prisoner to be remanded, as not entitled to bail, being committed not on suspicion of felony, but on express charge of felony on the face of the warrant; and therefore not to be bailed unless particular circumstances had been shewn:

Bail.

ON it's being objected against a person that he stiled himself gentleman, when he had a commission in the *Birmingham* way—Lord *Mansfield*—Is no man to say he is a gentleman who deals by commission?

Bradley Clerk of the Peace.

ON a question, whether the clerk of the peace taking an assignment under the act of insolvency, the assignment shall go to his heirs, subject to the provisions of the act, or to his successors.

Lord *Mansfield*—Whether the clerk of the peace took ^{• Nomine officii.} officially is not regularly before the court. However there can be no doubt; it gives to the clerk of the peace, [•] not to him and his heirs.

Another question, whether the assignment should not have been by deed indented and inrolled?

Lord *Mansfield*—I suppose there is a purchaser which makes this application still more improper, if an agreement is depending. If an agreement has been made actually, bring your action, and the court will give a solemn opinion.

Insolvent Debtors.

ON the act of 32 G. 2. for the relief of insolvent debtors; the court did not receive the petition for want of notice to the plaintiff.

Evidence.

ON a motion to enlarge time of trial, on account of the absence of a material witness.

It was on a case which arose abroad. The dispute was about a quantity of rum, and whether the rum was the plaintiff's private property, or belonged to the owners of the ship. It was said, the second mate of the ship, was the only person who could prove this point: And they refused to admit an entry made by the second mate, in proof of the matter.

Lord *Mansfield*—If the witness was dead this evidence would certainly be good. There used to be thought a difference if he was beyond sea; but I see no reason for the difference, unless it should appear the witness is coming home. This is not the case of a cause arising in *England*, and the witness goes abroad. We will therefore, though in the common case we enlarge only for one term, enlarge in this case in infinitum if the witness cannot be come at, and they refuse on the other side to admit real evidence.

Goodright on Demise of *Rosse against Harwood*.

A summary Note of the Arguments, in the Question of Revocation; with the opinions of the Judges more at large. C. B. 21 June 1773.

THIS was an action of ejectment, to recover chambers in *Lincoln's Inn*. On a special verdict, the jury found a will made by Mr. *Lacy* in 1748, (whereby the defendant claims) and they find, that he being seised, *int. al.* of the chambers, and also being intitled, by virtue of a marriage settlement, to certain lands sold, and the money to be employed in the purchase of other lands to the same uses, but which money is not as yet laid out in the purchase of others, did by his will, bearing date as above, devise as follows. I give, bequeath, and devise, to my dearly beloved friend Mrs. *Mary Harwood*, all my real and personal estate whatsoever and wheresoever; and I further will and desire that she pay the following legacies; [they then find a small one to his niece, the plaintiff, who is heir at law, and two other legacies in the usual manner to servants] and that afterwards in the year 1756, he made another will in writing, signed by

by himself, and attested by three subscribing witnesses, whereby he made a different disposition; but in what particulars on their oath they know not; and they further on their oath say, that they do not find that the testator cancelled, or defendant destroyed it; or what is become of it, [283] they know not, and conclude in the usual form, praying the judgment of the court, whether this be a revocation; and if it be, they find for the plaintiff; if otherwise for defendant.

The first will was in evidence on the trial.

It was argued by Serjeant *Burland* for the plaintiff, and Serjeant *Davy* for the defendant.

Serjeant *Burland*—That as the devisee cannot be to take the same interest as in the first, she was to take none at all; for every thing had been given her by the former will, except 2 [or 3] trifling legacies; and if something was taken away from her by the latter, the former and latter could not stand together.

Serjeant *Davy* for defendant—That there must be animus revocandi; that no accidental destruction of a will would set it aside. That a will cannot be revoked without either express revocation, or contrary appointment. Serjeant *Burland* in his replication, cited *Howard and Howard*—1 *Vez.* 179. Lord *Hardwicke* said, the settlement in that case very providentially revoked the will, though the uses could not take effect.

Serjeant *Davy*—That in the case of Lord *Anglesea's* will, the House of Lords was of opinion, that two wills and seven codicils made one entire will. In the case of *Hitchen and Bassett*, 1 *Shower*, an issue had been directed out of the Exchequer upon a bill of the heir at law's bringing; a revocation was found; Lord *Hales* seemed to have been much dissatisfied; another issue was directed; the jury find specially a latter will, but do not find he has devised any lands. Court determined, a revocation did not appear; for that it was not found any lands passed, and therefore it stood indifferent.

Lord Chief Baron *Hale* indeed says, where there is a second substantive independant will it operates a revocation, by construction of law, though there is no express revocation; but it may be otherwise here; and it does not appear but it might be a confirmation.

3 *Mod.* 203. 4 *J.* 2. K. B. In ejectment: Special verdict, that Sir *H. Killigrew*, [on whose will the question before the Exchequer] in 1644 made a will; in 45 he made aliud

aliud testamentum, but what was contained therein the jurors are altogether ignorant: Judgment four years after, in *K. W.* for the plaintiff; judgment affirmed in the House of Lords.

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Vide *Salkeld* 592. Where, in the same case, the court was of opinion this was no revocation, but might concern other lands, no lands at all, or might be a confirmation of the former. Here Mr. *Lacy*, in 1748, devised his real and personal estate to the defendant; and gave directions to her for the payment of legacies. That, in 1756, he made another different, but what it contained they do not know; and they do not find that testator cancelled, or defendant destroyed it; they do not know what is become of it. I might contend, that this part of the finding is repugnant, and therefore void; for if they never saw they had no legal evidence; if they did, how could they find a different disposition, and yet not know in what.

(It was objected from the bench—What if they had been told by an attorney who drew the will, that he meant a different disposition?) Serjeant *Davy*, Sir, that might have been something, but they say no such thing.

Objection from the bench. Yet the jury is not to find the evidence, but the fact, and give their judgment upon it.

Serjeant *Davy*—But, my Lord, it would have gone no farther than evidence of meaning, and not a will actually made.

Now as to the point of revocation. It was said, and the same argument ran throughout, that every latter will revokes a former. 'Tis true in words; but, I say, to revoke a good will is required that the latter be inconsistent with the former; or revoke it in express words. So that all the arguments used by *Pemberton*, *Maynard*, and those great men, from *Swinburne*, *Godolphin*, and *Coke*, are merely found. I own that where an act is done irreconcilable, or inconsistent, 'tis a revocation.—As if he make a will to a person incapable of taking; though this be void, 'tis a revocation of the former by the plain intent: And so if a bequest be made without livery. But if there are two wills consistent, both stand, and shall be but one will and instrument, and operate jointly as the whole last will of the testator. Every several devise is in like manner the will of the testator. I give my real estate to *A*; this is his will: I give so much of my personal to *B*; this is his will: And thus there ever so many particular devises, without regard to

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ference of time or instrument containing them, all taken together constitute his complete last will; nor shall any be defeated on account of those which are subsequent, unless for manifest repugnancy between them.

But 'tis said, if there are two wills without dates, neither shall stand, that is, if the one be inconsistent with the other; but otherwise, both. *Coward and Marshall, Cro. E.* the court determined, where there were two wills that both might stand; though the testator had married between the one and the other; and this, though there was a manifestly different disposition between one and the other; [and that a material one] since they were not contradictory. [285]

It seems then, that there may be different instruments, both of them consistent, and both shall stand. A man makes a partial disposition, as of his lands in the province of York; he may make another of his lands in the province of Canterbury: If he makes a will afterwards contradictory to either of the former, which shall it revoke? Only that to which it is contradictory. On the words *aliud testamentum*, it was contended in the case of *Hitchen and Bassett*, that it must be another detached from the former, and therefore, as being the last, defeat the operation of that which preceded; but this failed on the principle already maintained, that every part of a will is the testator's will; and the whole collectively his last. Perhaps, the testator might have a doubt as to the effect of his former will on the lands converted into money, which were to be reconverted in land; for if a man gives all his real and personal estate, and afterwards lays out money in lands, neither the lands will pass nor the interest in equity. A case was mentioned 2 R. 2. where a revocation was held, because a different executor appointed.

I think, whether a revocation or no revocation is matter of fact, and must be left to the jury; it was the very issue in *H. Killigrew's case*; as whether a man guilty of murder, felony of any other kind—these are technical legal terms, which the jury frequently find the complicated fact, together with the matter of law resulting from it. [I think Serjeant Dary intended to intimate, that from the imperfection of the finding on the special verdict, the court were left in uncertainty, and that as they had not taken upon them to find generally, at least a *venire facias de novo* would be proper. And qu. what more particular? I should almost incline to think the jury, from what Serjeant Dary said, had found that

that he made a second will, but did not revoke the first, (as meaning not in terms) and then left the title to court.

Objection from the bench—Suppose the jury had found thus, “that testator had made a second will, whereby he “revoked the former;” would not this have been open to the court, upon the circumstances; like other legal terms, on the effect whereof the court judges [I think, this was substantially what was observed. *Sed qu.*]

The court took a distinction and said, “where the instrument is complete, that revocation or no revocation is “matter of law, before the court; but where the instrument is imperfect, by reason of interlineation, there the “jury are to find.”

[286] Serjeant *Davy*—I proceed to a short case or two farther.—Suppose the jury had found the will totally different; but that it did not exist at the time of Mr. *Lacy's* death: Then I contend there was no need of republication of the first will; but the will, which alone existed at the testator's death, stands; and the other was a nullity. In the case of *Glazier and Glazier*, before the court of K. B. the testator made a will; afterwards he made a second, effectually revoking the former: This will he afterwards cancelled. The jury find all this matter: The court, on very solemn deliberation, held, that the cancelling of the second will was an immediate republication of the first. I am willing to answer all that has been said by my brother *Burland*, out of respect, as not choosing to pass over any thing he has said. If I have done otherwise, it has not been intentionally. I beg leave to conclude with this observation.

Though the jury have in this case believed the witnesses and found that another will was made, it may be of dangerous consequence to encourage the construing this as a revocation of the former, without knowing the will itself; there will be no securing a will, if another will may be set up as a revocation, without any necessity of shewing the will itself. The legislature has taken great pains by the statute of frauds, which will be made ineffectual. The case of *Ridgway* was before the statute, and very probably mentioned that part of it which relates to wills. The court seemed to doubt, whether the statute meant not that the same authority, the evidence of the instrument, should be necessary for revocation as for making. However, it is observed, that deeds and acts of parliament may be supported on parol evidence, if proved to be lost.

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Note, The case in 10 Co. 94, with the reasons there laid down, seems very worthy of observation, especially as to the necessity of shewing the deed itself, unless that be proved impossible; and if it be, the same reasons may seem to hold still stronger, for a full finding of contents at least.

Serjeant *Davy*—Suppose a will made two days before the testator's death; and the jury find the making of this will, and that, inter alia, there was such a devise; but whether it was in being at testator's death, or what else it contained, they are totally ignorant.

Mr. Justice *Blackstone*—It seems of consequence that, for ought appears, the second will may exist now.

Serjeant *Davy* applied the maxim, *de non apparentibus & non existentibus eadem est ratio*.

Serjeant *Burland*—If my brother *Davy*, who has contend- [287]
ed against the finding as void, could get rid of another objection, I should be very little solicitous about the rest: It is that, *ex vi termini*, a different disposition must be taken to be an inconsistent one; and why a different will, except to make a different disposition. He contends however, that there was no possible evidence: But your Lordships have given in great part, indeed entirely, an answer; and the court will suppose the jury have found on complete evidence: Parol evidence may be admitted of the contents undoubtedly. Every will adding to the former would not be a revocation; but inconsistency in any part is a revocation.

The court seemed to be very clear, that lands converted into money, to be reconverted, were a part of the realty, and the money would pass as lands, under the name of real estate: And so, I think, there has been a very late authority.

This question afterwards came to be adjudged *Hilary* term, fourth *February* 1774.

Mr. Justice *Nares*—This was on an action of ejectment, of chambers of Mr. *Lacy*, on the demise of lessor of the plaintiff.

The special verdict states, " That Mr. *Lacy*, being seized of certain lands, by virtue of a marriage settlement, which lands had been sold, the money was to be laid out in the purchase of other lands; and being entitled also to chambers in *Lincoln's Inn*, made his will in 1748, as follows: I give, bequeath and devise to my dearly beloved friend, Mrs. *Mary Harwood*, of *Maiden-lane*, all my real and personal estate, whatsoever and wheresoever:
" And

“ And I further will and desire, that she pay the following legacies ; to the testator’s niece 300l. and two other be-
 “ quests, in the usual manner, to servants.”

The verdict proceeds to state, “ That Mr. *Lacy*, still en-
 “ titled to the estates, in the purchase whereof the money
 “ was to be laid out, did make, and duly publish, another
 “ testament in writing, with three subscribing witnesses:
 “ And the jurors on their oath say, thereby he made a dis-
 “ ferent disposition ; but in what respects the jurors know
 “ not : And that they do not find that testator cancelled, or
 “ defendant destroyed it ; or what became of it they know
 “ not.”

[288] I shall not trouble the court with the infinite number of
 cases concerning revocations, but only that of Sir *H. Killi-*
grew’s will, reported in *Hardr. 3 Mod. Salkeld* and *Shower’s*
P. Cases ; in which I shall use the opinions on both sides in
 my opinion on this case : On which I will first observe, there
 is evidently a title in the lessor, as niece, and, by the cir-
 cumstances of the family, heir at law of the testator. The
 Maxim. heir at law is greatly favoured in judicial decisions ; and the
 maxim holds, *melior & fortior est dispositio legis quam dis-*
positio hominis. No conjecture or implication, other than
 necessary, will be admitted ; and revocations, being consi-
 dered as remitters in favour of the heir, are introduced on
 circumstances, and by legal operation, *invito testatore.*

Therefore *Owen 76*, a man, fearing he was only tenant
 in tail, suffered a recovery, in order to enable his disposition
 in fee : But this recovery bars his will. In another case,
 where a man was about to make a feoffment, but being told
 it would hurt his will, said he would not, yet did, by advice
 afterwards, on persuasion it would not prejudice his will ; as
 far as livery and seisin had gone, this avoided the will. And
 in the *Roman* civil law, whence all our notions of testamen-
 tary dispositions, the favour to the heir was carried much
 farther : Therefore a will made, where parents, sisters, or
 brothers, give nothing either to the other (for it was reci-
 procal) was termed *inofficiosum testamentum*, and con-
 cluded insanity. But afterwards this relaxed, or at least
 evasions were found ; and therefore *quantacunque pars lega-*
ta saved the complaint of *inofficiosum testamentum*. What
 is here set up in bar ? A will, against which another will is
 found on the verdict.

Nor is it to be objected, that the heir does not shew this
 second will ; or that, for default of proof by the heir, that
 it does not make equally against her ; she should therefore

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fail of support to her title. No man shall be bound to shew that deed whereto he is a stranger, and neither claims any thing comprized therein, nor in right of one claiming under it. And this is held 10 C. 94, and *Brook monstr. de fait*.

Neither does it lie upon the heir to plead it otherwise than generally; and accordingly *Plowd.* 410, by all the judges, a party in any title or bar shall not be obliged to plead more than makes for himself. A man may plead a feoffment generally, though upon condition, without pleading the condition. And therefore, suppose *ejectione firmæ*, a devise pleaded; you make your replication on the statute of mortmain. To this, in replication, the plea must be of the saving, or that the devise is to the university. Suppose this an *ejectione firmæ*: Plaintiff claims as heir; defendant sets up a last will: Plaintiff in his replication, that it was not a last will; he is not bound to shew more: But she must shew, either that the second will was defeated, or else that it is a confirmation of the first; so far at least as she herself is concerned.

In the case in *Croke E.* 721, the second will was adjudged [289] not a revocation of the first; because, on comparing them, it appeared they both very well were consistent. But it is incumbent on the devisee, claiming under the first will, to shew the second is consistent with the first: For, *prima facie*, it appears otherwise; a codicil, and not a will, being the proper instrument to vary; and a will (as a complete instrument) naturally intending a revocation of any former will, till the contrary can be proved.

Nor do I apprehend it is necessary that the jury find expressly in words, a revocation, if they find such circumstances as amount to one in law. 2 R. 2. *Lex revocat in se*. And neither need fraud be found expressly on the verdict, *Maxim.* if it be plainly apparent on the matter found; as in the case of *Oliver and Robertson*, last term; for *ex facto oritur jus*. In the case of *Killigrew*, the jury did not find whether there were any lands at all devised; and the court held it immaterial; for had they not said so, the court would not have presumed it. But as they did, the finding was not the worse. At the best, Mrs. *Harwood's* claim did not appear certain; the jury doubted at least whether it was not defeated by the second will: And even so, if they are uncertain whether her entire interest, or any part of it, remained by the second will, the construction will necessarily be in the negative; *quoties cunque juratories dubitant an aliquid sit perinde est ac si non esset*. For, if they don't find any thing

thing in her favour, *de non apparentibus & non existentibus eadem est lex*. But it is said, the finding is inconsistent; the finding cannot be otherwise on the evidence. The testator said, "However she might think she should take every thing, she was d——bly mistaken." Now she was general devisee, under the first will, nor can she lay claim to the chambers, unless they find them expressly devised.

If a doubt remains, whether the will exists, as I cannot but think it does, or ought, then, in dubiis non præsumitur testamento.

If the will should be found, I think the lands may descend in the mean while, as 9 *E.* 4. 26.

This I say, without relying on the maxim, that a complete will is ipso facto a revocation of the first: And where there are two wills without a date, both are void; because one is subsequent: And, which ever it be, it revokes the former.

There is almost every thing. The will must be presumed to be *de eadem re*, 1 *Shower*, 49. The disposition shall be presumed to differ in the general, and not only in particulars.

But it was said very ably, at the bar, that the court must look into the will; and the entries are quibus lectis & auditis; that is, where they are to decide upon particular premises, between devisees, or on the whole will; but here, it makes against the defendant.

The chief justice said, in *Killigrew's* case, "We cannot fancy so and so." However, they found at last they were obliged to fancy something. And Serjeant *Pemberton*, in that case, says, "If there is to be a presumption, it shall be in favour of the heir at law."

[290] But what is the effect on the statute of frauds? In *Cartb.* it is said that a scottment may operate as a revocation. And *Darley* and *Darley*, [*C. B.* sed qu.] the seventh of this king, that a recovery operated as a revocation. I apprehend, this case comes within the words of the statute, which says, "Unless altered by another will in writing." And here is one in writing found. I am of opinion, there is sufficient ground for me to determine it a revocation.

I am therefore of opinion that there ought to be judgment for the plaintiff.

Mr. Justice *Blackstone*—In considering this special verdict, I was at first inclined to think, it was either imperfect or repugnant, and therefore that there should have been a venire facias de novo; on further consideration, I think it is neither.

ther. Not imperfect, for they have found every thing they can, and it would be superfluous to order a new jury; not repugnant, because I can conceive a case in evidence, which would warrant such a finding, as testator saying, "He had made a new will; but no man should know in what till after his death." But though the finding may be good, as to these particulars, yet the circumstances may be so slender, as not to warrant our determination in oversetting a legal and apparent disposition. They find, that the plaintiff was almost absolutely disinherited by the first will, which is now existing, and apparent legally before the court; they find a second will, which appears not, nor is any where to be found.

I shall not enter into the crude and uncertain opinions of early times; but shall enter into the case of Sir *H. Killigrew's* will, just previous to the statute of frauds; which passed before almost all the courts of law and equity, and finally into the House of Lords.

The case, I apprehend, was this: Sir *H. Killigrew*, in 1644, made a will in favour of a Mrs. *Berkeley*, and a natural son; in 1645 he made a second, which, like this, was never found.

Soon after the restoration, the court directed an issue to be tried by a jury of the county of *Cornwall*, whether the will was revoked. The jury find generally, that it was revoked. Serjeant *Maynard* reports, 1 *Show.* that the old gentleman, meaning Lord *Hale*, wondered what the jury could mean. A second issue was ordered in *Berkshire*; the jury find specially, that he made a second will, "aliud testamentum;" but do not find, that he devised any lands by the second will; a third trial was offered, but the parties declined it, despairing, I presume, of any more light upon the second will. The court was of opinion, therefore, on the finding upon the second issue, that it not being found whether there were any lands devised, it stood indifferenter: And accordingly they adjudged. 2 *Car.* 2. *Hudr.* 374. And on this ground the third trial was offered. [291]

After this, it came before Lord *Nottingham*, in the court of Chancery; and, to stop the merits, his Lordship granted a perpetual injunction: But, some time after, they succeeded better with the Master of the Rolls, and so got rid of the injunction.

This case is very well reported 3 *Mod.* 203, and 1 *St.* 146. It is also reported in *Cumberbach*, 90, but very ill. The argument being on the second day from King *William's* landing.

landing, no judgment was given at that time; and all those judges were removed at the revolution. But in *Trinity* term, 5 *W.* judgment was given for the plaintiff, who made title under the first will: A writ of error was brought into the House of Lords, to reverse the judgment, but it was affirmed. And by *Salkeld*, 592, it appears, the court were of opinion, that it might concern other lands, or no lands at all, or be a confirmation of the former.

It has been admitted, and received as law, before and since the statute of frauds, for near an hundred years, that a second will, no where to be found, cannot operate as a revocation; and a will which is not necessarily inconsistent, shall not, where the contents appear, operate as a revocation; and therefore in *Coward and Marshall*, *Cro. E.* 721. *A.* devises lands to his youngest son, and his heirs; and afterwards remarried, and by another will, devised the land to his feme for life, paying annually a rent to the youngest son, and his heirs. Whether this be a revocation, was the question? and held, not; but both may stand, unless manifestly contrary. In the present case does it appear the second will, must be inconsistent with the first?

[292] It is observable upon the case in *Hardr.* my Lord *Hale* agrees with the rest of the Barons, in thinking that the second will not appearing, does not revoke the first; though he thought that a subsequent, independent will, whether consistent or not, even though of chattels only, would operate as a revocation.

I rely on the case already cited, that, where the matter stands indifferenter, it may concern other lands, or no lands at all, or may agree with and confirm the former. There is no finding, but that this second will is not an exact transcript of the former. The jury find a different disposition; this might have been found without a special jury. How does it differ? Was it of lands, or not? Was it real, personal, or mixed? Did it enlarge or lessen the devises of the former? How did it affect Mrs. *Harwood's* claim? Did it take it away entirely, or make a change in it, as to some particular limitation, or leave it entirely untouched?

It is impossible to find an answer on the verdict to any of these questions; and yet, without one, without our seeing more fully than at present the purport of the second will, how are we to determine that Mrs. *Harwood's* apparent claim is defeated by it? A mourning ring, or a husband, would satisfy the finding.

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So strictly was revocation interpreted, to avoid prejudice to an established will, even before the statute, *Cra. Car.* 51. Testator devises certain legacies to his brothers, and other persons; afterwards, in the space of some years, falling sick, he was asked questions, concerning whom he would have executor, and of his funeral, &c. and farther, was desired to give legacies to his father, brothers, and other relations: Said he would not give or leave them any thing. All this was set down in a codicil, and proved. Whether this was a revocation of the legacies to the two brothers, plaintiffs? And determined not, on the case made; and so decreed by the Lord Keeper, assisted by the Master of the Rolls, and the three judges, *Doddridge, Jones, and Croke*: For, non constat, what the testator meant by those words, and upon such doubtful speeches, to nullify a will advisedly made, without clear and perspicuous revocation, shall not be admitted. So here, non constat, what is meant by this different disposition, or to what it extends: And we cannot, to help the difficulty, go out of the verdict; for I take it to be a settled rule, that nothing shall be presumed on a special verdict, except by necessary implication; except in the case of spoliation, where every thing shall be presumed against the spoiler. But here, the jury find a strong negative; for "they do not find that testator cancelled, or defendant destroyed it." And if any presumption could be admitted on any verdict, the law will certainly never presume a crime, in any instance. However, it is said, something must be presumed on both sides; and if that be so, the scales shall preponderate in favour of the heir. But a negative is no presumption, that lands are not gavelkind; that a will is not revoked, and the like: This is not presuming; it is a question on matter of fact, and the proof lies to be made on the other side, non neganti sed affirmanti incumbit probatio. And in this case, presumptions are necessary for the heir, but not for the devisee; who shews a plain title, and puts the opposite party to the positive proof of it's being defeated. [293]

Maxim.

And here too, the custody of the second will is never surely to be presumed in the devisee of the first. For if it was against her, it would have been entrusted to any body's hands but her's; if for her, it matters not who was entrusted with it.

Revocations of devises (and the same may be said of uses) are either immediate and direct, or constructive.

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The former species of revocations might be introduced by parol, before the statute, in the most improper manner; and these the statute provides against. With respect to the other sort, 1 *Vezey*, 292, it is reported Lord *Hardwicke* said, "These words of the statute (referring to the 6 s.) are an express exclusion of any other means: For the words against the clause are both negative and affirmative." And in *Atkins*, it must pursue s. 6. which section is, "No devise in writing, of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will, or codicil, in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent. But all devises and bequests of lands and tenements shall continue in force until the same be burned, cancelled, torn, or obliterated, by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil, in writing, or other writing of the deviser, signed in the presence of three or more witnesses, declaring the same." Whatever, then, Lord *Hale's* opinion of a will of chattels revoking lands might be, before the statute, it cannot now be law; all presumptive revocations are at an end. And very probably, if the time is considered, Lord *Hale's* opinion in that case gave rise to that part of the statute.

The attempt is hitherto unprecedented, of destroying one valid will by another hitherto unknown: And, whatever favour the heir may merit in the eye of law, I will venture to assert, his claim is not more sacred, in a free, commercial country, than a valid and apparent testamentary disposition.

[294] If there be any question, it shall be between the devisees of the first and second will; but never to let in the heir. And 3 *Mod.* 258, goes still farther: For the plaintiff in ejectment made title as heir at law; the defendant under a will. The plaintiff produced a subsequent will, attested by three witnesses, but not in presence of testatrix; which, though not good as a will, they contended, might be good as a revocation; for that it was a writing sufficient under the statute of frauds: And, upon the first argument, it was adjudged for the defendant, "that a second will must be a good will, in all its circumstances to revoke a former will." It is reported also, 1 *Show.* 159, and the court, in *Carthew*, 80, that the second will cannot be good, as a de-

vise

use of lands; and yet, that it cannot operate as a revocation, contrary to the intent of testatrix. And in the case 1 W. 343, Lord Cooper recognized the case of *Eccleston and Spake*, because the devise of the same lands to the same person. And, for ought appears in the case before us, this may be even a legal devise of the same lands to the same person. And, if the second will contained a different disposition to a third person, and the first will was destroyed, on a supposition that the second was good, this, he said, should never let in the heir, though the second turned out to be void, any more than a cancelling by mistake, where a testator, sick in bed, and with two wills under his pillow, should order his friend to cancel the last, who, instead thereof, cancels the first.

A second devisee might avail himself of a different disposition, to maintain an ejectment; but the heir must prove a revocation, and not a different disposition: For, as Lord Cooper says above, "the meaning of the second will was "to give to the second devisee what it took from the first; "and if the second could take nothing, the first could lose "nothing."

I fear I have been too long; but the novelty of the case, and the greatness of the opinions against me, extorted it from me. I apprehend, that it would be of very dangerous consequence; it would let in perjuries innumerable, and set aside the statute of frauds entirely. Either an express revocation should be found, or such contents of a will as the court may clearly see.

Least of all should it be in the case of an heir at law; who might keep a second will private, and yet avail himself of it, as a revocation, by raising conjectures, which common sense will presume; that the second will was not a mere copy or transcript of the first. And therefore, I think, judgment for the defendant.

Mr. Justice Gould—I disagree with the opinion of my last learned brother; but entirely concur with that of my brother Nares.

I take the case to be entirely novel, and nothing similar to it but the case alluded to of *Basset*: For there the jury did not find any lands devised by the second will; the court held it immaterial.

The court of King's Bench, at some distance of years, [295] had in effect the same case before them. It may be sufficient to say, that it appeared to be the sense of the bar, and of both courts, that a second, if not consistent with the former, would amount to a revocation. Indeed, though
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by the words of the statute of frauds, an express devise of lands is made necessary, or an express revocation, in writing, yet, Lord *Cowper* held, in the case before cited, that where there was a devise of chattels, with express words of revocation, it should revoke lands.

Maxim.

I take it, from the extraordinary application and learning of those who discussed Sir *H. Killigrew's* will, that a second will, not consistent with the former, is a revocation; for, voluntas testatoris est ambulatoria usque ad mortem: And revocations, by operation of law, are not excluded by the strong words of the statute. And the intention of the testator is not necessary; for even against it the operation of law shall revoke a will. And I think it never has been doubted, that dispositions of trusts, which are expressly mentioned in the eighth section, are not more revocable by operation of law than a will. Even marriage, and birth of a child, has been held by three learned judges, a revocation.

There are three points to be considered:

1st, Of the existence of the second will.

2dly, The effect of it's non-production.

3dly, It's consistence or inconsistency with the former.

As to the first, the existence of the second will, they do not find the testator cancelled, or defendant destroyed it. This is similar to the case in *Hardress*, which *Finch*, the solicitor-general, contends with the court, that the finding of the jury was good there, which was, that they did not find any lands devised; for that, this being matter of fact, shall not be presumed by the court: And very properly compares it to the case of fines without proclamations, *Heb.* 262. If a fine be found, but no finding of proclamations, the court shall not presume any: And in that case, if the jury had found that they did not find there were any proclamations, this would have made the verdict never a whit the worse; for it would have been only a fuller explanation of their mind. Thus I take it here; when a will is found, the presumption is, that it exists, till it be proved to the contrary: And the finding of the jury leaves that at least untouched, and in it's full vigour.

[296] As to the second question, of the effects of it's non-production, whoever has the possession of one testamentary disposition may be presumed to have the possession of all, and can come at them. It is against reason to suppose the heir destroyed it, who is almost totally disinherited by the first. Next, the finding does not take away the presumption

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tion of devisee having the will in her possession, if it does not even strengthen it.

We must at least suppose, if that ground is not tenable, that the will is mislaid or lost: And then the finding is good, and the evidence properly admissible, at common law. The jury find, that what is become of it they know not. The jury in *Hitchen* and *Basset* find, aliud testamentum, in writing, which, by the law of evidence, speaks as well after the statute of frauds as before.

It is true, the statute of frauds requires a will in writing; but if the will exists, the defendant is presumed to have it; if lost, it must be proved as it can.

3dly, I think we must take it, that the jury find absolutely a different will: *Qui dicit generaliter nihil excludit*. If they had thought the disposition differed partially, they would have said so. I can't help taking them to understand, that the general disposition was different, though in some particulars it may agree: And this is certainly a revocation. Maxim.

But suppose them not to be taken so generally; and that it be uncertain whether a general or a partial difference, yet it puts the devisee to her title.

The title of all fees is, *prima facie*, in the heir; it must be taken from him by clear and unexceptionable title, and the devisee is an abatrix, unless she shews a written title against him. The heir is said to be the favourite of the law, but this is not strictly true; for, in the scale of equal justice, there is no favourite; but the law sees a clear title in the heir, and therefore will expect certainty to over-let it.

I can't subscribe to the obiter dictum of my Lord Cowper, in the case alluded to from *Peere Williams*, who says, if the devisee was different under the second will, and the first was destroyed, on a supposition that the second would be good; if afterwards the second turns out void, this shall not let in the heir; nor take from the former devisee, to vest in him. This would be finally to vest in a person in whom finally the testator did not mean it should vest, in prejudice to the heir, who, *prima facie*, has the title.

But are we clear that the heir had not at last the favour of the testator, and that a person entirely a stranger to his blood should sweep all. The presumption you may see in *Swinburne* 162, by very strong cases carries an almost irresistible bias in favour of the heir. And the testator in his second will might, if I may say so, be in a more perfect state



state of sanity, and the natural regard to the heir have it's effect.

I will cite, as to the heir's being a favourite, what Lord *Hardwicke* said in a case before him, which was taken by the afterwards Lord Chief Justice *Wilmut*, who was even then esteemed remarkably accurate in his notes.

“ There are a great variety of cases artificially distinguished, concerning the favour always shewn to an heir at law. [As where presumptions are taken from change of circumstances, or from some act or saying of the testator, whence it is concluded it might be, that the testator meant to make an alteration in his will.] This reasoning is sometimes rather forced, and perhaps not a little too refined; but where there is a second will there is no such difficulty; and we may do an injustice if we disinherit the heir; but the claim of the devisee being vitiated by uncertainty, there is no such danger.” I am therefore of opinion that judgment should be for the plaintiff.

Lord Chief Justice *De Grey*—There can be no occasion, after so learned and accurate a discussion, to enter into an argument. I will state my opinion on detached grounds.—It appears clearly to every one who considers the subject, that the heir has an original and substantive, the devisee a dependant and derivative title, supposing the same disposition continue to the death of testator.

The testator is presumed to have continued in his intention, till it is proved he has done the contrary; so where a change of intention appears the same constancy is presumed, till farther alteration is apparent. It appears too, that a person may make an alteration gradually by different dispositions, in different instruments. We may see the difficulty in the case *Cro. E. Coward and Marshall*, a codicil is an instrument to vary; a will, in its *prima facie* import, shall be intended a full declaration what shall be done after the testator's death; and therefore a second, revocation of the former. The court with great caution and prudence said there, it shall be only a revocation *pro tanto*. I take it to be right what my brother *Blackstone* said, that it was the final opinion, that a will shall not be presumed *ipso facto* a revocation of the former; but the court shall see the contents. But the variety of trials shewed great hesitation; and though it stands finally, and so I am willing to take it, that a second will, without looking into the contents, shall not revoke the former; yet, if you can look so far, as to find that there

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was a different will, then the first will, if I may use the expression, is not the last.

But let us suppose the case in *Hitchin* and *Busset* to have been, not that the will could absolutely not be found, but that the rest being destroyed by fire or vermin, there remained only the signature of testator with the date, and attestations of the three subscribing witnesses; and these words in the beginning "I hereby revoke all former wills," this is not merely a revoking but a disposing will; for throwing the other into the fire would have answered the purpose of revocation. I conceive Lord *Cowper* may be understood of a conditional revocation; as if it were—"if such a devisee can take, that then the former will be revoked; there if the second devisee by event cannot take the former will shall stand." If a man had devised, "I hereby dispose of all my worldly estate as follows?" I apprehend no man could claim under the former will. If in this case, it had been, "whereas I have disposed of the greater part of my estate to Mrs. *Harwood*, I hereby make a different disposition;" this, I conceive, would have prevented her settling herself under the former will.

In the case of *Kitchen* and *Busset*, it appears, "that the making a new instrument presumes some change, but may not be of itself sufficient to revoke." But it will, if there be other circumstances, as if the situation of his family was in general at least the same as before, his estates the same; he makes a will with three attesting witnesses, (which was not necessary as to personalty but to real only, and Mr. *Lacy*, was a person very conversant in courts of law, and a very able lawyer.) Circumstances being such, claiming under a derivative title you must shew me, (and there I ground my judgment, in which I am sorry to differ from my very learned brother *Blackstone*;) nothing has been done by the second will, to affect your claim, shew me that the disposition of the second varies not as to you; and we are satisfied. Can Mrs. *Harwood* maintain her title, without presuming? It must be presumed the second will does not concern lands, or only partially, or only in an estate for life.

If it may be otherwise, I apprehend that a will may be evidence of different contents, yet if we can't produce the instrument there will be no effect: and yet no man shall suffer for loss of evidence in writing, by fire or misfortune; and even records shall be proved as they can.

What is the case of two wills without dates? *A.* takes by one will, *B.* by another; both come in exclusion of the heir;

heir : And yet as neither can prove as against the other, the title, the court will not arbitrate between the parties, will not permit them (as might appear on the principles of natural justice) to divide, but the heir at law stands aloof against all the world, and says till some of you can prove an express title against me, my original right shall stand.

In the case of spoliation it is presumed, the spoliation was made by the devisee; because the instrument destroyed was against the devisee.

I can see no ground, that the disappointment of the intention of the second will should set up the former.

The jury do not find that he did cancel it, I might almost say they find he did not; but law will presume it not cancelled till proof. And I have said already the effect may operate as a revocation, and yet the purpose never answered.

In the case of Lord *Lincoln*, who in compliment to a lady he intended to marry raised uses, and yet never married, none of these uses took effect; yet they operated to defeat his will: And so it would have been had he actually married, and all the uses had been spent. A woman makes a will when sole, and after marries; and by operation of law, though her husband dies before her, yet the act of marriage was a revocation; and, as every will implies revocability, that power being taken away, the will no longer subsists: So where a man marries and has children; (by a late determination) and yet, here are no words of revocation. I am therefore of opinion, that judgment ought to be for the plaintiff before the decision.

'Tis observable, that on the conference upon the bench it was remarked, that Mr. *Lacy* might be in doubt, for it was at least a question at the time of his making the will, whether a reversionary interest which he had, would pass by the words real and personal estate; and if they comprehend what was not a legal estate, but a bare equitable interest.

Serjeant *Burland* observed, the case of *Glazier* in the K. B. had been determined in the Ecclesiastical Court, before Sir George Lee, *Vide Hilliers case*, 3 *Atkins* 798, the contrary way; and that from the ecclesiastical law we borrow all our ideas of wills. That if we were to conjecture, the intent might rather be to give her money instead of chambers, which he supposed, on account of her sex, by the laws of the society she could not inhabit. Serjeant *Dary* said, he had forbore to say any thing before about the ecclesiastical courts on purpose, but if that was to the point, he

he had the strongest case in the world, for they had determined for him. The court declined giving judgment on the instant, which Serjeant *Davy* urged, as he said, he had no doubt a judgment in their favour would release 10,000l. out of Chancery.

Lord Chief Justice—If the court should see cause to de- [300]
termine in your favour, there would yet be certainly a writ of error.

N. B. I learn by a friend, the testator was tenant in tail of the lands, under his father's settlement, with a reversion to the right heirs in tail, whose heir testator was; and the lands having been sold, was directed by statute 8th of Queen *Ann*, in some degree confirming, in others altering, the settlement to re-vest part of the money arisen from the sale, in other lands to uses of that settlement. Testator died without issue, and without re-vesting, and his heir at law claims as by the reversion; and also that *Mr. Justice Nares*, in saying that the lands might descend to the heir, till discovery observed on the authority laid down by *Lord Coke, Co. Litt. 111.* that where devisor seized in fee devises lands by will, the freehold or interest in law is in devisee before entry; and in that case nothing descends to the heir. This however he seemed to hold as an obiter dictum, and to deny the law as there held; and therefore that notwithstanding, in the case before the court the lands might descend conditionally, though the devisor here, by failure of issue at his decease, had the reversion in him at the time of his death, as tenant in fee.

I am reminded by a worthy friend of the following case; ex parte *Heller* Apr. 30th, 1754, 3 Atk. 798.

A question in a cause before Sir George Lee as Judge of the Prerogative Court, whether the execution of a second will is a revocation of the first, though the second was afterwards cancelled; and whether such cancelling set up the will again.

Sir George Lee gave sentence that it was a revocation; and that the cancelling the second did not set up the first.

A petition was prepared to the Lord Chancellor on the part of the principal devisees, for a full commission of delegates; and also a cross petition praying that the commission may issue to judges of the common law and civilians only.

Lord Hardwicke directed a commission of delegates to judges and civilians only.

Et ut audivi this case afterwards came before the delegates, and the majority confirmed Sir George Lee's sentence ex relatione Rowlandi Aynsforth Armig. J. C. Vide infra the case of *Berkenshaw* and *Gilbert*.

Interrogatories.

KEEPER of *Maidstone* Gail sworn to answer interrogatories, touching a CONTEMPT, supposed to have been committed by him against this COURT. For default of bail he was COMMITTED.

Notice in Ejectment.

[301]

DECLARATION delivered at a house of ——— in *Buckinghamshire*, which borders on lands in *Oxfordshire*, for which lands the ejectment was brought.

Mr. *Cowper* observed, that declaration in ejectment was in the nature of an original writ, as proceedings commence by it. And that the Common Pleas carried it so far, that they expected it to be served on the premises demanded in ejectment; and would not take service on the wife, to be service on the husband.

Court were agreed service upon the party at his house was good, tho' the premises were in another county.

And Mr. Justice *Aston* said it differed from an original writ, because the sheriff had not a jurisdiction out of his county.

Information.

ON a motion for an information, the original papers should not be annexed to the affidavit, as it produces a difficulty and trouble on a trial.

Ejectment.

MOTION for judgment against the casual ejector.

There were joint partners in the business of brewers, and the declaration was served on one.

Per curiam, that it would not do as they had not served it upon both; it not appearing that they lived both in the same house.

Attachment.

MOTION for an ATTACHMENT against the SHERIFF for not returning the WRIT.

The

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The court at first doubted, whether the motion was right the last day of term.

Mr. *Buller* said, whenever the attachment was absolute in the first instance, he understood it to be the rule, that it might be moved the last day of term. [302]

COURT—You must serve personally, to make it absolute. The under sheriff has a public office, and it should have been served there. Instead of this, it was served upon a maid servant.

Oyer of Copy.

Of Letters of Administration.

MOTION, that oyer of a copy out of the consistory court, may be sufficient oyer.

Objection, that letters of administration are not like a deed.

And that it being stated, the letters of administration were taken out of his pocket, the party was not entitled, as he gave no account of them, nor did it appear they were lost; and unless this did appear, he should not have recourse to a copy, even in the case of a deed.

RULE ABSOLUTE, that oyer of a copy from the consistory court be sufficient oyer.

Declaration in Ejectment.

SERVICE of declaration in ejectment on the niece, in the absence of the tenant in possession.

It was said, though this service had been admitted to be good, where the tenant in possession absconded, to keep out of the way of the notice; yet here the aunt had in fact not absconded, nor was out of the way, with an intent to avoid the notice: But that she kept a boarding-school, and it was her custom to be absent at *Whitsuntide* and *Christmas*. That the niece received the notice, she, the aunt, being absent, according to her custom. But that the niece did not tell her of it, as she did not know when she would come home.

But it not being denied in the affidavit, that the niece did give the notice, nor denied that the aunt received it, upon these grounds, RULE ABSOLUTE.

Constable's

Constable's Return.

COMPLAINT against the constable by the grand jury, for refusing to amend his return; he returned generally that all was right in the parish.

There happened to be a very bad road in it which the constable had not presented: And the grand jury therefore directed him to amend his return, which he refused to do.

He said in his excuse that it was true the road was very bad, but the man had promised to mend.

Lord *Mansfield*—You should have remembered you were on your oath, and to find according to truth and fact. The jury have done right. It is extremely blamable in a constable to find upon favour and affection.

The jury would do well to consider whether they might not do very right to find a bill of indictment against him which as Justices of Peace, so is the Grand Jury impowered at common law to do on their own knowledge, as well as upon the information of others.

The evil has diffused itself in a scandalous manner over the kingdom.

Evidence.

OBJECTION to a receipt for damages taken by the plaintiff's attorney, specifying the verdict, that this was not evidence of the judgment, for that nothing less than a copy of the judgment, duly authenticated, could be evidence of the judgment.

Lord *Mansfield* disallowed the objection, declaring it was captious, that there was no dispute between the parties as to the reality of the judgment; and that all the question between them was matter of form, and even that might have been cured, if the jury would have waited a couple of hours. That on a similar objection at *Guildhall*, he made the jury stay for a copy of the judgment.

Attachment.

ON a rule to shew cause why an attachment should not be set aside for irregularity. The irregularity complained

plained of was, that the attachment was absolute in the first instance.

The master said it was discretionary in the court, whether it should be absolute in the first instance or not.

That the sheriff, for not returning the writ, parties, for non-payment of costs, pursuant to a rule of court, have the rule absolute against them in the first instance: And that he apprehended, that the general rule was, that wherever a party was guilty of a contempt, he shall answer in custody.

King and Jones, in Strange.

That *Salkeld*, 84, it was said, it was not usual to give a second rule to a party who had slighted the first; that he should answer in custody; that to do otherwise would be to expose the court to further contempt.

Mr. Dunning—That unless the justice of a court is obstructed, an attachment will never be granted in the first instance.

That where there is an application against parties, for disobeying a rule of any nature less high than that of the immediate and necessary justice of the court, the court will always give them an opportunity of justifying themselves.

That this was entirely different to the case of a refusal to pay money under an order of court, or of insulting an officer of the court.

That one of the parties was an infant, and that the court would certainly not attach him, for doing what by law he could not do, being guilty of a contempt, an offence which he was not of age or discretion to incur.

Lord Mansfield desired to see the rule, and the affidavit upon which it issued, and the affidavit of disobedience.

With regard to the general practice, *Lord Mansfield* enquired; and there was, he said, a little difference of opinion, as to the general rule.

But in the present case (his Lordship added) it is as clear [305] as the sun, the rule should not go absolute: For, as to many, it was not delivered personally; and, as to undertaking to deliver up possession, they can answer no farther than to what was in their own power, and not jointly and severally.

In case of non-payment of costs, the attachment is in the nature of an execution; but here, the defendant was apparently in the situation of not being able to make title. And the parties knew it: For I bailed him at *Guildhall*, and would

would not suffer a large sum to be required, though I could not dismiss without bail.

Mr. Justice *Aston*—I wonder very much at the doubt.

As to non-payment, it is in the nature of an execution upon the civil suit; as to the disobedience of the sheriff, he is an officer of the court; as to contemptuous words against the process or insult, by words or actions, when this is represented by the officer to them, the court will pay a particular attention in favour of the process; and in these instances the rule is absolute at first. But, where a reason may be assigned for non-performance of the rule, as on not obeying an award, or the like, the court will always grant a rule to shew cause at first: And I wonder the officers of the court should have any doubt about it.

Q. N. Nam videtur valde bone diversitie.

Lord *Mansfield* observed, that an attachment for non-payment of costs, was so much in the nature of an execution, that the parties were not bailable.

Lord Mexborough *against* Sir John Delaval.

ON a rule to shew cause why, on payment of costs, judgment should not be set aside against defendant, upon two nihilis returned on two writs of *scire facias*. And why the defendant should not be permitted to come in as executor, and plead *nil debet*.

The case appears to have been, that Sir *Francis Delaval* being indebted 10,000*l.* to Lord *Mexborough*, his brother, Sir *Thomas*, joined with him as security; that afterwards Sir *Francis* applied for 5000*l.* to pay off annuities, which his brother, Sir *John*, lent him; the surplus, if any, to be applied to the payment of Lord *Mexborough's* judgment debt. That afterwards a proposal was made, to change Sir *Thomas's* security for that of Sir *John's*, on condition that Sir *Francis* should make an estate tail to the son of Sir *John*; [306] which condition was never performed, and Sir *Francis* died about a quarter of a year afterwards, and the estate descended to Sir *John*. Lord *Mexborough*, on a false return of two nihilis, procures judgment on the 10,000*l.* debt against Sir *John*, who was executor.

Counsel against the rule—Whenever the court sets aside a judgment regularly obtained, it is always to let in the merits and justice of the case: And if these be not here with the defendant, your Lordship will not grant him the indulgence of this summary proceeding.

Sr

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Sir Francis Blake Delaval was tenant for life of a very large estate: yet, wanting money, he borrowed 10,000*l.* *Sir Francis Delaval's* brother had the estate made over by an assignment in trust, to pay an annuity to *Sir Francis Delaval*.

It was thought proper the brother, *Mr. Thomas Delaval*, should make a security, with his brother, to *Lord Mexborough*, for 10,000*l.* It was thought, between the family, that it would be better to let in *Sir Francis's* other brother, instead of *Thomas*; and *Sir John* was to pay 4000*l.* per annum, on condition that *Sir Francis* should join to cut off the entail when his son came at age, and that the debt should be paid off. *Lord Mexborough* was advised to give up his former security, which he did, and set up the covenant only, and the first judgment obtained against *Sir Francis* solely. *Sir John* was to pay only 2500*l.*

Sir John contended, that he was not bound to pay the debt on the estate, as *Sir Francis* died in a quarter of a year, without having performed the condition of making an estate tail; and that he was executor to the covenantor, and could not be sued upon the death of the testator, who was covenantee. That *Lord Mexborough* having been prevailed on to give up his former security, and having no remedy, but upon the executor of the testator, the court would not suffer the judgment to be set aside, in prejudice to the justice of the case.

Judgment by default was signed on the second scire facias.

A fieri facias was then sued out, and the sheriff returned nulla bona.

A *davastavit* had been sued out, upon which the defendant pleaded the general issue, *nil debet*;—that the defendant was informed of all the proceedings against him.

Mr. Wallace—If *Sir Francis Delaval* has any remedy to which he is entitled, he will have it in another manner.

The ground of the application is, that *Sir John Delaval* [307] has no more assets than 1600*l.* to satisfy the 10,000*l.* and therefore applies to the court, that he may not be liable to pay any more. It is not denied, that *Lord Mexborough* had lent the sum: but he entered into an agreement with *Sir Francis*, who became bound with his brother.

Sir John comes in after, only in a more beneficial manner, as a recovery is to be suffered as soon as his son shall come of age, that then a term shall be created to raise the sum of 25,000*l.*

25,000*l.* for payment of the debts, among which Lord *Mexborough's* is one. An annuity is provided for Sir *Francis*, to cease when Sir *Francis* shall think fit to advance himself in marriage. Lord *Mexborough* was applied to, that Sir *Francis* and *Thomas* had ceased to act; that Sir *John* had taken the management; and an absolute security should be made, as before, to his Lordship; He was assured of this by Sir *Francis*, in the presence of Sir *John's* attorney.

That afterwards Sir *John*, upon the death of Sir *Francis*, set up the non-performance of the consideration of making the estate tail. That in the case in *Strange—Wharton*, the court would not admit the executrix to plead, that she was ready to satisfy the creditor with all assets in her hands, merely on account of delay.

Mr. *Cowper* said, that Lord *Mexborough*, having an equitable claim and lease, and a legal right, and having proceeded regularly, shall therefore be entitled to his legal remedy, and the defendant not admissible to a summary relief.

Mr. *Buller*—That, on principles of law and equity, the plaintiff was entitled, and the defendant barred: That the debt was just, and the proceedings in it regular. That as to the equity, the defendant should bring equity with him, when he demands it; that he should pay equitable assets.

Mr. *Dunning*, on the other side—This case stands upon a peculiar footing. I understand, that the learned Serjeant, who spoke before, professed that the rule must stand, unless there could be new matter, on which he could throw the court otherwise.

That as to the costs, if the gentlemen dropped their action in the Common Pleas, then the costs would be paid; if it were continued, they would await the event. That as to the intent of not paying the 10,000*l.* it was at least doubtful whether such was the meaning of the application. That as to delay, the circumstances were different from what had been stated. That Sir *John* was not apprehensive

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of the effects of the proceedings against him, and therefore did not proceed with the utmost expedition.

That as to the 5000*l.* if they were legally entitled to it, they would recover it the only way by which a legal debt is to be recovered, that is, legally. That the case in *Strange* differed extremely, because there the matter had been decided, as to liability, two years before: And whether a delay after that, upon an application, as of course, was like a

delay

delay of one term only, the matter not being decided, he submitted to the court. That case, indeed, was cited only for what the court had said, and which they also had said in the second case, then referred to, with respect to not driving the party to an *audita querelon*, a method in a great measure obsolete, the same thing being done on motion. That these returns are in fact matter of course, and it was not desired of them to do their duty by serving the two writs, but that they should return the two *nihils*, instead of serving them, this is contended. This is the equity for which they contend.

They say before the court, in substance, if you don't give us the 5000*l.* give us a legal right to 5000*l.* Why this pains? If they have a legal right, they will litigate it with us; if not, why do they claim? As to this 5000*l.* it was lent by Sir *John Delaval* to his brother, for paying off annuities; and because Sir *Francis* had not agreed with his annuitants. And for the payment of other debts are words added, with respect to the application of the surplus. Is it to be conceived that Sir *John Delaval*, who lent a sum to his brother, to be repaid, *ex vi termini*, for paying off pressing incumbrances, should now be obliged to give 5000*l.* for the benefit of his brother-in-law, Lord *Mexborough*?

As to the deed, if Lord *Mexborough* was in contemplation, he is in the number of those who are entitled to the 2500*l.* Shall a covenant be enforced when the condition has totally failed? It is true, Sir *John* has now the estate; but that was not the benefit in contemplation; the benefit in contemplation was to move from Sir *Francis*: In consequence of which, and in the consideration whereof, Sir *John* was to pay the 2500*l.* The possession of this estate is independent on the deed, advantageous as it has happened, but foreign entirely to the deed.

That an equitable title has arisen has been next stated, from conversation between Sir *Francis* and Lord and Lady *Mexborough*, in the presence of Mr. *Farral*. It may be sufficient to say, Sir *John* was not present, and that Mr. *Farral* had never been employed by Sir *Francis*. If permitting his brother to employ his own attorney, in a deed for his brother's benefit, was making that attorney his own attorney, I do not know: There is nothing else that can in this instance.

The business of Sir *Francis* with Lord *Mexborough* and his Lady was nothing to Sir *John*. If Sir *Francis* did say that

that security was absolute upon this deed, he misrepresented the matter ; but neither is this any thing to Sir *John*.

If it be said that as an executor he has taken benefit, and is liable ; if it be a benefit, it is one he entered into reluctantly, only taking the office as heir of the family, to bind himself as to what he thought assets.

Serjeant *Davy*—It has been the practice long before I knew *Westminster Hall*, that where there have been two *nihils* returned, and the defendant had been informed he could have made his discharge, the court will not put him to the trouble of an *audita querela*. I don't remember one since I have known *Westminster Hall* ; the court has always relieved upon motion.

A practice there has been for the sheriff to return *nihil*, that is, nothing within his bailiwick by which he can summon the party ; this is done by the desire of the prosecutor. A second writ issues, and then the principle laid down, is, that two *nihils* returned it shall be the same as if on a *scire feci* there had been no return, the case is quite different ; and the practice may be much more reasonable. It is the interest of the party to make the enquiry ; and the law will intend he does it. But an executor may be totally ignorant of a judgment against the testator : If it were allowed any judgment, creditor might ruin an innocent executor. The court never did allow this ; I trust the court never will allow it : It would be a reflection on the laws if they ever did allow, on a *scire feci* the party is personally warned ; the sheriff is liable to an action for a false return ; and therefore on a *scire feci* the defendant is for ever concluded ; and an *audita querela* can't relieve him. Here in this case the defendant has immediate security, personal service is not necessary, the sheriff too is not liable to an action for a false return.

Lord *Mansfield*—How so ?

Because, wherever the return is a negative only, the sheriff cannot be liable to an action ; and so it is upon a *non est inventus*.

Lord *Mansfield*—Is it so ? I think I have lately determined otherwise.

[310] I was going to say my Lord that if the plaintiff can prove, on a *non est inventus*, that the sheriff did not execute the writ, then he may have his action against the sheriff, but not the defendant. In these *nihils* it is as well known as that there is a sheriff in *Middlesex*, that the plaintiff always solicits those returns.

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Lord *Mansfield*—It is a very bad practice, and ought not to be continued; and it does not seem to be founded in reason or consistent with law, nor with the opinions of the court, that the sheriff may not be charged with an action for a false return even though negative.

Serjeant *Davy*—As to the equity of the case, there are, they say, equitable assets to which the plaintiff is entitled, whatever they may be if they are not legal instead of equitable, the court will not deprive Sir *John* of his legal advantage; and I would only farther say, as I would not go over the same ground which has been so well trod before me, that your Lordship will not determine upon the proceedings, ex parte, without hearing Sir *John*'s evidence.

Lord *Mansfield*—I think, brother *Davy*, what you have dropt may be exceeding proper, and tend to prevent expensive litigations between parties nearly allied. That Sir *John* might be permitted, and *Farral*, to make affidavit of what passed in the conversation between Lord and Lord *Mexborough*, concerning giving up the old security; which was certainly a good one; and that it may appear how far Sir *John* was concerned in it either by himself or the act of *Farral*.

To be sure the court regularly adheres to regular judgments, if in the support of the merits and justice; but if AGAINST THE MERITS AND JUSTICE THEY ALWAYS GET RID OF THE MERE FORMALITY OF THEM; but they do it upon terms. I see it may be of great consequence to the parties to have this matter cleared up, they may make their affidavit on *Monday*.

Affidavit of Sir *John Delaval* and Oliver *Baron*. *Baron* believes that Sir *John Delaval* was in possession from 1764 to 1771, of all Sir *Francis Blake Delaval*'s settled estate, subject to an annuity to Sir *Francis* of 2,000l. per annum; that both these opponents have heard Sir *Francis* express his apprehensions, that Sir *Thomas* would become a bankrupt; he being, as these deponents verily believe, in very bad circumstances at that time. *Baron* says, that in pursuance of a letter [from Sir *Francis*,] the deponents and *Thomas* went to *Doddington* on the 29th of *May*, Sir *Francis* entered into an agreement to release Sir *Thomas* within twelve days from the security of 10,000l. to be paid to Lord *Mexborough*. That Sir *John* said he had nothing to do with it, not knowing of the loan; and that he thought himself ill-used, in not having the security disclosed to him. That Sir *John* made a proposal to pay off Sir *Francis*'s debts, which Sir
Francis

Francis shewed him an account of; that Lord *Mexborough* was not among them. That Sir *John* was astonished at the amount, that he agreed however to lend 5000l. to buy in annuities for his brother; but that he had nothing to do with Lord *Mexborough's* debt; and that he expressed an idea the 5000l. was too large for the purpose of paying off the annuities; but Sir *Francis* said he must have elbow room. That *Farral*, the attorney, asked Sir *Francis* why he had not mentioned Lord *Mexborough*, and to which Sir *Francis* replied, he had not mentioned for fear of oversetting the whole. That however he was persuaded to propose it, and Sir *John* accepted the charge to be made on the estate; that *Farral* was very urgent that Sir *Francis* might be bound by forfeitures not to marry, and Sir *Francis* also was urgent upon it; that he Sir *John* said, he thought such restrictions of marriage were illegal; that then Sir *Francis* said you do this to get over our agreement. No, says Sir *John*, to convince you of the contrary, if you will cause it to be inserted, that unless counsel shall think such forfeitures good both in law and equity, that they shall be void, there I will agree.

Proposals were made that Sir *Francis* should settle an estate tail upon Sir *John's* son: When they came to town counsel were of opinion, that the restrictions were illegal and void. That the deponent *Oliver* thought he did Lord *Mexborough* a material service in getting Sir *John's* consent to stand security instead of Sir *Thomas*, and thus procuring a good security instead of what he understood a desperate one. That *Oliver* applied to the plaintiff, mentioning a design to release Sir *Thomas*, and make Sir *John* security; that Lord *Mexborough* and his Lady not seeming to incline to the exchange, *Oliver* *Baron* said to them, I think your Lordship loses little or nothing, and may get a very good security instead of a bad one; that however, they still remaining disinclined, *Farral* left them; that Sir *Francis* spoke earnestly to *Farral* afterwards, and insisted upon Lord *Mexborough* being persuaded by *Farral*, to consent to the exchange of securities; saying that Lord *Mexborough* was like a mad-man if he did not, that the estate would be in the hands of the assignees if *Thomas* held it six weeks longer. That *Farral* refused to go unless sent for by the plaintiff, he says that Lord *Mexborough* did actually send for him, and seemed ready to execute; but to his great surprize, when the matter came to be discussed again, and Sir *Francis* declared the security of Sir *John* to be as good as the bank of *England*, Lord and La-
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by *Mexborough* expressed an apprehension that Sir *John* was to get by the security.

Farrall repeated that his Lordship could loose nothing by the security. Lady *Mexborough* said, you may loose nothing, but *Tom* will be ruined unless something is done. That Lord *Mexborough* said, he wished he had never lent the money; and Lord and Lady *Mexborough* said it was very wrong to do Sir *Francis* service, and afterwards reproach him for it. That then his Lordship consented; but upon [312] the instrument being read by *Farrall*, when he came to the words and I acknowledge to have received satisfaction, Lord *Mexborough* said, he had not received satisfaction, I with I had. On which the deponent said, my Lord you have only a chance of satisfaction, I can't promise you any more. Sir *John* observed on the forfeitures being declared illegal, that then he must not suffer the estate to be charged with Lord *Mexborough's* debt, as otherwise he should be tied and Sir *Francis* free. That the deponent *Farrall* believes that the reason of Sir *Thomas* and his Lady being unwilling to confer satisfaction on Sir *John's* security, and accept Sir *John's* was, from their apprehensions partly that Sir *John* would take a benefit, and partly from the deponents saying that his Lordship had only a good chance for a satisfaction, which he truly thought.

Sir *John* speaks in confirmation of all this part, and that he is sure Lord and Lady *Mexborough* knew, and he had told Lord *Mexborough*, that by the family settlement there was a contingency of Sir *Francis* having children, and therefore he Sir *John* could not make an absolute security, till his son, who was but ten, came of age. That the intent of making the day of the covenant bear date with that of the agreement, was not to make void the agreement for 1000l. annuity to be paid to Sir *Francis*, for that he admits payment due for 1000l. That Sir *John* had raised 45,000l. and had never taken any benefit therefore during the life of Sir *Francis*. That he told Lady *Mexborough*, she knew he had never received any benefit from the covenant, and that he is informed by eight learned counsel he can derive no benefit from the same, and is not liable to pay any part of the 1000l. other than from the surplus of the 5000l. after paying annuities.

Lord *Mansfield*—The manner in which this application is made misled me the first day it came on, for it is stated as a judgment debt obtained; and therefore an application for an equitable relief on their performing equity and payment of costs.

costs. I was therefore misled to suppose this was a case of a judgment debt obtained, to be relieved on a motion to which there might be an equitable right, as upon an *audita querela*. And an idea being suggested to me that this was an unconscientious use made by the plaintiff of the judgment, and that it was capable of being turned unconscientiously the other way on the matter of form, I therefore thought it right that the affidavits, especially on Serjeant *Davy's* side, should be entered into. There was never an intention of entering into the merits, but putting them into a way of being tried. If Sir *John* is debtor, by a specialty he can't discharge himself as being executor, nor as conditional trustee; but in this case Lord *Mexborough* has his remedy, not excluded nor prejudiced by this motion.

[313] Supposing, as seems, that there was a condition to be performed in the covenant, then if Sir *John*, or *Farral*, his agent, had drawn Lord *Mexborough* in, as on a good security, and absolute, his Lordship would have had an action on the case, for the 10,000*l.* so that there would have been no occasion for setting the matter upon terms; but this has been positively denied. If the defendant thinks he has any ground to go upon, he is not embarrassed by the form, notwithstanding his representation.

I come now to what I premised. I think the defendant has proceeded too candidly: And I think that they ought to have proceeded against the judgment, as unconscientiously obtained. And therefore, though it's nothing to the parties, yet, for the sake of the practice, and of the rule, I will order the rule, without payment of costs.

The assents applied for in *April*—promised when applied for—due diligence used—account delivered in, by which there appears a very considerable deficiency—nothing objected—in the mean while, he is tempted into a judgment of form, of which he can know nothing, no notice being given; and it's made a confession of assents, contrary to their own acknowledgment.

Now, without prejudice to practice, this was done in *Trinity* term; pending the amicable treaty between them, the judgment is obtained. Now, by way of reference, when it operates as nothing but reference, a form merely may be sufficient: As to this, it's the parties business to take notice of it. But when an executor, an administrator knowing indeed of the judgment in this case, but who may know nothing of it, shall have been drawn into a confession of assents, as by default, for that is the principle on which it proceeds, in such

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such a case as this, the setting aside the judgment is **EX DEBITO JUSTITIÆ**, when such an use is made of it.

I would have it understood from this judgment, that no principle of law exists so diametrically opposite to justice. Upon form, against another, it is very well; but by way of serious conclusion, it is unjust and unconscientious. If you would make a real use of it, you must give a real notice.

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Licence.

MOTION for an information against a justice of peace, for refusing a licence to the informant.

An indictment had been preferred against the person to whom the licence was granted, for stopping up the king's highway, but quashed. A second indictment was preferred; the justice refused to quash it, and said, if it was quashed, it should be in the court of King's Bench.

The case stated on her side was, That an agreement had been made with the complainant for building a bridge; that she, not being paid, nor having conveyance made to her, according to the agreement, within the time agreed, discharged the workmen, and stopped up the road. That the public had enjoyed the road for ten years; after which she made the obstruction, and, after applying to the justice, he refused the licence, without reason.

The case made on the other was, that at first there was no real consideration, but that it was only agreed that the public should be at the expence of the repairs. That afterwards the justice, on her request, agreed to pay 10l. to her son, as heir at law: That he tendered the 10l. but that she, after the public had enjoyed it nine or ten years, demanded a consideration for the ground, and an agreement to be made between them. That then, on their refusal to comply with this new demand, she obstructed the works. And that, as to refusal of the licence, he was moved thereto, because the house had the fame of a disorderly house; and that he has a witness, on whose affidavit it will appear, that it was a disorderly one. And that they had not suggested that the house is necessary to the accommodation of the inhabitants. That if the reason suggested, of the road, had been the true one, still he ought not to be harrassed with an information: But he

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he positively swears to the other, of it's being a disorderly house.

Lord *Mansfield*, when the counsel was about to go on, said, he thought they were very wrong on both sides.

That as to the woman, it appeared evidently, she had made an agreement, and that a note of hand for 10l. was in her son's hands, pursuant to that agreement. If she thinks, after this, and with the public enjoyment for ten years, if she thinks she can come off, because there was no conveyance, (after much trouble and litigation) she will find herself much mistaken, and is very ill advised. It is an unjust attempt.

On the other hand, I can't agree with what was very tenderly hinted, that a justice of peace may refuse a licence because a party will not come into his terms. She may be ill advised and unreasonable; but still this will not bear him out in such an application of his authority. It is the case of *Nash's vineyard*. As to her character with respect to her house, I wish nothing had been sworn about it. It appears to me, it would have been as good twenty years after as twenty years before; for which first years he has nothing to say against it, had she not obstructed the road.

But she ought to have come for an information with clean hands, and that not appearing the case, yet, in compassion to the woman, and for the benefit of all parties, I should be glad to hear she would withdraw her information, on their granting her a licence, and payment of the 10l.

Mayor's casting Vote.

I think, of common right, the mayor has no casting vote, but must support his claim either by charter or usage. *Per Lord Mansfield.*

In assault and Battery.

DECLARATION, by way of recital, and whereas, Briggs v. Sheriff
Dobbs v. Edmonds
nota in this
case. It first began with a recital, and afterwards there was a positive averment.
per curiam in that case, that the objection must not be extended, as having gone
enough before, and that the latter part good, and the former cured by verdict. Vide
the same case in Lord Raymond, 1413.

[316] CURIA—You had better waive the objection, as the party will of course be permitted to amend.

Vide *Bullivant v. Holman*, Cro. Ja. 537.

Case of Hotley against Scot.

Mr. Dunning stated the Case.

SIR *John Astley*, tenant for life, remainder, after intermediate limitations to the now Earl of *Tankerville*, by virtue of Sir *John's* marriage with the granddaughter of the then Earl, she being previously seised of the estates in question, and others, joined with her husband to levy a fine, whereon a power was derived to make leases in possession, but not of future interest, and so as it be incident to and go along with the reversion; clause of re-entry, on non-payment of rent, for twenty-one days.

Under colour of this power, Sir *John* granted a lease, by indenture to Mr. *Prichard*, in 1761, to hold by a yearly rent of 21l. with proviso, in case rent should be behind for twenty-one days, having been lawfully demanded; or no sufficient distress or assignment, that then it shall be lawful for Sir *John*, his heirs, or assigns, to re-enter: And the rent is also reserved to Sir *John*, his heirs, and assigns. Another lease, with like proviso, in case of rent behind, or want of sufficient distress. By attending to the terms of the reservation, you will see the objection, which is the power of re-entry to Sir *John*, his heirs and assigns, whereas it should be, by the terms of the power after his decease, to the reversion or next remainder-man.

Second objection, that whereas the re-entry is by the power unlogged with the necessity of demand, or failure of distress, Sir *John* has burdened it with these. Had Sir *John* reserved a power to himself in a fee, which was his own, I think the objection would be fatal; much more so, as the power is from his wife, and the clogging is to the prejudice of his grandson. The case of *Brooker and Merid* will be objected, where the construction was held of the words of the statute of H. 8. with respect to rent reserved by tenant in tail, where heirs and assigns will be taken to be such as should become entitled to the reversion in the family settlement; but the statute does not speak any thing of the remedy, the power does.

And though the construction may avail, as to the rent it cannot as to the title. Lord *Tankerville* is in by a title pa

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amount, and the only one under which Sir *John* derives, and which the granddaughter of his ancestor, Lord *Tankerville*, certainly meant to reserve to him; which cannot be [317] as heir or assign to Sir *John*, and which Sir *John* seemed to think, quite forgetful of the power.

Lord *Mansfield*—I should be glad to know if the words stated are precisely, “so as in each lease there be a clause of “re-entry, if the rent be unpaid for twenty-one days.”

This was admitted.

Mr. *Bearcroft*—With respect to the other lease, *Prichard* and *Whitfield*, I doubt my duty to the court, and myself, will not permit me to argue that a *die datus*: that of re-entry in thirty-one days: That, still more, of the estate for life exceeded.

Lord *Mansfield*—To be sure, a *die datus* is a settled point, and cannot be departed from. If it were now open, I should incline to construe exclusive or inclusive, as would best substantiate the deed; for the expression is very ambiguous.

Mr. *Bearcroft*—I am persuaded his Lordship means to take exceptions of form, to shew his generosity, in granting new leases upon the same terms.

As to the object, with respect to the re-entry, I understand it is admitted, the remedy for rent will be the same. And how is this objection to be supported, upon a fair and liberal construction? And it is agreed, with respect to powers of this sort, the court will construe as liberally as a court of equity. Let me then be admitted, as they support their cause by a liberal construction, to support mine by the same. As to the word “heirs,” I cannot understand Lord *Tankerville* as an heir, certainly; but if I can make him out to be an assign, it will be sufficient for your Lordship’s determination. I know not there is any technical definition of the word assign. Now Sir *John*, joining with his wife, may be properly construed as grantor; and Lord *Tankerville*, if he has a right of re-entry, (which sure he has by law, and of which the tenant will be cognizant) he has the right as an assign.

Let us consider as to the operation of the power of re-entry. I contend it adds nothing but what comes in by force of law, or follows upon a deficiency of the vague and not sufficiently explicit words of the power. Is not rent always to be demanded, before a distress becomes liable, or forfeiture incurred? And as to the other, if there be a sufficient distress, what then? The rent will be recovered without

without re-entry; and neither in reason, equity, or conscience, could there be any other intent of the original power. In some respects, Lord *Tankerville* has an advantage; as for instance, without clause of re-entry is improper, and rigorous, the power complained of defends the person. And the attorney who drew the lease was the person to start the objection.

Mr. *Dunning*, in reply—I don't apprehend the nature of the case, or Lord *Tankerville's* character, makes it requisite for me to insist on indulgence. As to him his character hath hitherto stood unimpeached, and will stand unimpeachable. As to the attorney, he may appear, when I have stated the whole, to merit approbation. He drew it as for a man seized in fee; he never was informed otherwise till after Sir *John's* death. He discovered the flaw to his own prejudice, as having a very beneficial lease. I do not deny that it would be very absurd, if, in the construction of powers, this court differed at all from the court on the other side. With respect to the case cited, or rather hinted, I gave it up, because I thought it shortened my question. If it had appeared material to my client, I should have done wrong not to have observed to your Lordship, that there the construction was *secundum subjectam materiam*; heirs special, not heirs general: But here the construction would require, that your Lordship should take as heir special him who is no heir at all.

With respect to the term assigns, Mr. *Bearcroft* said, there was no definition: It may be difficult to attempt a definition, as being too clear to need or admit one. However, I may thus take for granted, by way of definition, that an assign is one who can take an assignment from a person qualified to make it. It is not incident to a reversion: Does it anywhere arise from the contract? As to the distinction between the power given, and the power pursued, taking the original power of re-entry in the most liberal construction, (for I should be ashamed to make a verbal one) I think it is impossible to maintain the consistency of the latter with the former. There is but one condition in the former; no clause of re-entry. In the latter there are three conditions, of which only the first, the rent being behind, is the condition of the former. Can it ever be seriously contended, these powers are substantially and in effect the same?

Lord *Mansfield*—This is to try the validity of a lease, made in execution of powers.

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The state of the case is, *Mary Prince*, who married *Sir John Astley*, was seised in fee of the premises, and levies a fine; and afterwards made a settlement: And there is a power to *Sir John Astley* to grant leases of present and not of future interest; so as it go along with and be incident to remainder and reversion. And so as there be a clause of re-entry, in case of rent being behind twenty-one days.

There is a power of revocation.

All the uses subsequent to *Sir John's* estate for life were re- [319]
voked, and the Earl of *Tankerville* is become entitled, as remainder-man. *Sir John* is dead. Then comes the lease in question, with reservation of rent, and clause, in this manner; that is to say, with re-entry, on condition of the former nature, if rent unpaid for twenty-one days. There are one or two objections; first, that the meaning, though not expressed in the words, is, that clause of re-entry should go to the inheritance; that it does not if it goes to the heirs general of *Sir John*.

To prove that, by the power, it ought to be reserved to the inheritance, was not difficult: By the subject matter it must go along with the rent, and be incident to the reversion.

Nobody can have the re-entry but he who should have the rent, were there no lease; and so in the very text of *Littleton, Co. Lit.* 213. f. 346, 347; by construction therefore it must be so. Now upon the construction of the lease it's reserved for twenty-one years, payable half yearly, (that is the same as if it had been during the term) and then it goes with the inheritance. Then, what is the meaning of heirs and assigns, it must mean (it was admitted, of necessity, at the bar) those to whom the inheritance should go, and so is the reason and authorities. The heirs and assigns can have no other meaning. It would be superfluous to express the meaning more particularly; as in the case in *Sanders*, of a covenant reserved to a stranger, his executors and assigns, the court decreed, it must go to the devisee, and executor must be rejected.

Why then, as to the reservation in the other part, how was it to have been worded? They say expressly, to the persons in reversion, and remainder. It would have been void on the statute 34 H. 8. c. 24, if they were not assigns to the lessor by the settlement, they are assigns a thousand ways: They have provided sufficiently. As to demand, a clause of re-entry is required, as a security for the rent: Demand is requisite, both by common law and statute: A clause of re-entry

entry will never be allowed to operate farther than as a security for rent.

New Trial.

[320] NO interest had been paid upon a bond from 1754 to 1773: The jury found for the bond. Lord Mansfield said, the presumption against the bond was within no statute of limitations; would be governed by the evidence. A parol confession would set up a bond twenty years hence. That he remembered, from circumstances, the evidence of seventeen years had been taken as presumption sufficient against a bond.

The court granted a rule to shew cause, in order to inquire farther into the circumstances. *Quæras velim amplius de hac causa lector bone.*

Action for Money had and received.

IT was observed, this was a liberal action, in which the party waives all tort, trespass, and damages. As in a case of last term, (vide *Feltham* and *Tyrrell*) where it was rightly argued, you may waive the trespass and damages, where there is a trespass, and come for the money had and received.

But where an attorney has taken a receipt, and discharged defendant out of custody, he charges himself with the whole, and acknowledges satisfaction, and can't plead, that no more came to his hands than so much, and in that way clear himself of the residue.

Recital.

WITH respect to the "whereas," which was argued in declaration of assault and battery, the court was informed that exception was done with.

It was observed, that in *Fielding* and *Vincent*, it was first devised how to get clear of this objection: That the case of *Wilder*, in *Strange*, 1151, had farther shaken it. And that three terms after, the case of *Marshall*, 1162, made an end of it.

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New Trial.

MOTION for a new trial, on account of verdict against evidence.

Question, Whether an attorney exercising the business of a *scrivener* was a trader, within the statute?

Suggested that, upon the evidence, the jury ought to have found him a trader.

Rule to shew cause,

Civil Action.

[321]

CHARACTER of the defendant cannot be gone into in a civil action. Lord *Mansfield*.†

Recognizance.

MOTION for a *certiorari* to remove a recognizance—
Not granted as never having been the practice; but instead thereof rule to shew cause granted, why the clerk of the peace should not discharge the recognizance on payment of the fees.

Rule.

THE court will not oblige a person to give a copy of a declaration which has come into his hands without fraud or surprize, and without which the prosecutor cannot proceed against him criminally. For the court will not oblige a defendant to assist in a prosecution against himself.*

Administration.

TAKING out letters of administration on a false oath, is with respect to seamen a capital felony by the statute.

Venue.

AF T E R plea pleaded you can't move to change the venue.†

Attachment.

† In capitalibus extenuat aut excusat delictum quod non item in civilibus.

* Nemo tenetur seipsum accusare.

† Omnia ordine et decenter fiant.

Atlegans contraria non est audiendus.

Attachment.

MOTION for attachment, for non-performance of an award made in pursuance of a rule of court.
Rule to shew cause.

[322]

Slander.

DECLARATION stated, that whereas the plaintiff is a wool-comber, and a person had agreed with him for a certain quantity of wool, the defendant well knowing of the premises, and in order to bring him into discredit with persons buying and selling with him, and deprive him of his livelihood, spoke the words laid in the declaration, he (*in nuendo* the plaintiff) is not worth a penny, and he will run away.

2 *Shower's Reports*, cited " he is an idle rascal, and not " worth a groat ;" actionable if spoken of a trader. *Rolls* abridged in the very case of a wool-comber, " buy no more " wool of him, for he is not worth a penny."

It was said as to the averment, it was sufficiently averred for the court to see that the plaintiff was a wool-comber, and got his money by buying and selling in that trade ; as in the case in *Bronlow's Reports*, plaintiff states, that whereas he is a judge, defendant not being ignorant of the premises—held a good averment.

Mr. Serjeant *Davy e contra*, that the words were not actionable ; for that wherever a man not necessarily lives upon his trade, or so as to be liable to the statutes of bankruptcy, slander lies not for saying he is not worth a groat.

3 *Mod. Chapman* and *Lamphire*, a carpenter describes himself to be such, and then states, that he got much money by buying of timber and materials, and building of houses, and that the defendant spoke of him as follows, " he " is broken and run away and will never return again," which is much the same as stated here, and the judges were divided, two against two, whether these words were actionable or not. *Anderson* and *Fairfax*.

Action lies not for such words spoken of a farmer ; unless he declares specially, that he gets his living by buying and selling.

They would not be actionable if said of a vintner, nor of a shoemaker ; [this last the court denied] because not liable to the bankrupt laws.

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In the case 2 *Shower* 295, the words were spoken of a weaver; and the case stated specially, that he got his living by buying and selling.

It is not sufficiently stated here that any body traded with him, or he with any body.

The court thought otherwise: And that a wool-comber, [323] not stated to be a labourer, must of necessity be intended to buy wool to work with.

A farmer, the court observed, was no trade at all; which must have been the reason of the decision cited above.

The court further said, that they would not disturb the case, especially after verdict.

Information.

COURT will not proceed by way of information for every disobedience of a constable to a warrant of a justice, or order of sessions, but the method of proceeding is by indictment. *

Irregularity.

IN general you must come upon an irregularity at first, and not wait for a second, to set aside the antecedent. Irregularity of rule is to be taken notice of the moment the next step is to be taken. Irregularity of declaration in the same manner, before judgment. And so is the rule in the court of Common Pleas; and this on principles of justice, and for prevention of expence. You can't come after execution, to set aside judgment, on account of irregularity of the declaration: But the instant you have notice of judgment signed, you must take advantage of the irregularity, then at least, if not before. §

Trover.

MOTION to be at liberty to plead several matters in an action of trover.

COURT—By a book, near two centuries ago, it appears, release is a sufficient plea to trover, and you have no need to plead any thing more.

On

* *Nusquam recurritur ad extraordinarium nisi ubi deficit ordinarium.*

§ *Vigilantibus non dormientibus jura subveniunt.*

ON a question, Whether lime was within the act.

The act provides, that no person shall be liable to pay toll for any cart or carriage, or horse, &c. which shall be employed in carrying dung, compost, mould, soil, or any other thing, employed in the cultivating or manuring of lands. Pleaded, that lime was within the statute.

Objection, that lime was not within the exemption.

Ex etymologia.

Ist, That lime could not be comprehended within the words, dung, mould, or soil; neither, a fortiori, within the word compost, which necessarily implied a thing, in the making of which there was more than one article employed, and properly signified something artificially compounded. Lime is a simple article, and is, surely, not compounded by being burnt and brought to dissolution: which would rather decompose it, if it were a composition before.

Ex verbis antecedentibus.

The general words “any thing used in cultivating or manuring of lands,” must be referred to the antecedent words, which speak of harrow and plough, and must be understood to mean things ejusdem generis, instruments of husbandry. *

Ex statutis in pari materia.

Ex absurdo et inconveniēti.

Farther, that lime is always comprehended in express words, where it is meant to be exempt.

That nothing will pay, in this instance of the turnpike road of Lynn Regis; for lime is almost every thing that passed there.

On the other hand, it was contended, that the legislature used as general words as possible; clearly intending to comprehend every species of manure, and that if the exemption did not include lime, it would be totally nugatory. To the objection, that then the toll will be taken; for that nothing else was carried on that road but lime, it was answered, that this is only a branch of the general turnpike road.

That the words and intent of the statute both concurred to exempt lime; for that the clause first exempts all instruments of husbandry; next beasts and carriages for the conveyance of such implements; then several kinds of manure, specially named, by way of introduction to the general

* Verba intelligenda secundum subjectam materiam.

Verba generalia restringuntur ad habilitatem rei vel personarum.

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ral words, and then generally, in the most universal extent, any other thing employed in the manuring or cultivation of lands.

That the action was brought against the agent of the commissioners, whereas it should have been against the commissioners themselves. And that this was stronger than the case of *Evans* and *Sadler*, for the money had been paid back.

Lord *Mansfield*—It has very properly been observed, that where the legislature meant to exempt lime, they have expressly exempted it by name, as in the statute of the 7 G. 3, and the circumstances of this case give an additional strength to that objection, from its being the general manure.

It would be confounding the signification of words, to say lime is signified by compost.

It is abominable to make a catch by plea, in abatement to the indictment, on account of the name. And, as to the other mistake in filing it, if I had thought there had been any thing in it, I would have sent it back to be filled again.

I dare say, the commissioners defended to the action, and then it would have the same effect as if brought against them. *

Besides, if there were any weight in the objections, they come now too late for a nonsuit.

Trover.

Atkinson against Barnes.

GOODS of *A.* assigned to *B.* and *C.* *B.* sells them to *D.* who gives a promissory note, payable in fourteen days. After this *D.* assigns to *E.* all his goods.

The note having never been paid, *B.* refuses delivery.

D. brings trover, affirming that the giving the note was payment; and that thereby the property vested in him.

Gibson and *Ware* cited. Property assigned for a man of *Dantzick* to a man of *Berwick*. The man became insolvent.

An agent of his found means to come for the goods, which were sent by a ship. The seller gives notice to the captain of the insolvency, and, upon this, the captain refuses to deliver them; and accordingly they were not delivered into the hands of the agent. [326]

That

* Omnis ratihabitio retro trahitur et facto æquiparatur.

That here *Atkinson*, the assignee of *Chester*, the buyer, could have no better right than the buyer. That *Chester*, the buyer, had not made payment; for a note was no payment, till satisfied, and was only a proof of the sum the goods sold for. *Barnes*, the seller, kept the possession of the goods, by the desire of *Chester*, the buyer, till a time agreed on: And, upon this, it was contended, that the possession of the seller, in consequence of this agreement, was the possession of *Chester*, the buyer.

To this, Mr. *Mansfield* replied, that if it had been a delivery to a third person, it would have been so; but that here was no more than must be the case where goods are not immediately delivered.

Lord *Mansfield*—You need not give yourself any trouble; for the whole of the argument goes, I think, upon a mistaken foundation: That this was only an *inchoate* sale, and not perfect by delivery.

These are the goods *Stephens* sold by *Barnes*: There is a note, giving credit to all the world, that they were sold to *Chester*. *Chester* was to enter into the house, and desires that *Barnes* would let them stay, not to give him the trouble of removing them. *Barnes* agrees; they stay as furniture: And more than this, *Barnes* blows hot and cold; for he does not wait delivery of possession till the note be paid, but sends the goods to *Chester*.

After this *Chester*, not being solvent, applies to *Barnes*, and desires he would take back the goods. *Barnes* says, "I will not take back the goods; I will have payment." Upon this *Chester*, as he had a right to do, says, "I take this as a complete sale; and you must abide by it as such." Mr. *Barnes*, therefore, shall not plead that there was no complete sale; having affirmed one by refusing the goods, and demanding payment.*

Farther, he indorses the note to an indorsee; though he afterwards struck him out.

IN a case where parties, who were persons of considerable property, were proceeded against by original, instead of bill of latitat, Lord *Mansfield*, in a very strong and lively manner, expressed his indignation at the oppression used against

* Quilibet sua facta scire et præsumitur et debet.
Allegans contraria non est audiendus.

the suitors of this court, through compulsion by sometimes, and at other times through the passions who were employed in the cause.*

parties will not consent to appear, if they refuse to not to bring a writ of error, you may have great proceed by original; but to do it in the first in- especially as it was sworn on affidavit that the parties deposit the money in court before the original sued such a case, a method of this kind was highly censur- that, on first being informed, as far as entreaty, ob- and declaration, could go, he had gone; and if he might himself authorized to have made an order to such method of proceeding, in such a case he have done it very gladly; but did not think himself

ed. er, that it was destructive to the parties themselves eding; and seemed to intimate, that on a verdict more than once, in similar circumstances, threaten- we it to the jury, whether it was not a proper mo- them to encrease the damages.

cause there were twenty defendants. Against one an by suing out latitat: Against all the other nine- sue out so many originals. The attorney com- and owns, by his affidavit, that he disapproved original, under the circumstances; but that his pose it. It does not appear, however, that he ever his clients before not to do so, though he remon- afterwards. It was said farther, that whereas a bill the Exchequer was the cause alledged, the bill three days after the original. If any thing so delay could have been apprehended in parties of and in such circumstances, why proceed by lati- first, which was to try the merits?

Mansfield—There is no manner of doubt, but that may make use of legal process (legal in the ordinary proceeding) in such a manner as shall be a con- the court, and a most grievous oppression.

remember a case of Mr. *Hanbury*, who had bill with [328] man. There was a difference about some extra the bill was not immediately paid; the coachman, avenged, got his master to be taken into arrest about night; he was carried to a spunging house. He sent

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sent to me. I tried to consider, whether he could be taken out; but the process issued out of the Common Pleas, and I could not, therefore, get him out. It came before the Common Pleas, who committed both the bailiff and coachman.

So a tenant waiting for his landlord, on the day of payment he could not find him. The landlord arrested him next day. The court of Common Pleas made him pay the costs.

So on arrest of a merchant on the *Exchange*; the court, on the like grounds, committed.

Here I am glad to hear Mr. *Mallison* advised his client not to proceed. But they, hearing there had been a proceeding inducing a charge of felony, [the underwriters of a policy of insurance had summoned the master of the vessel to appear and answer before Sir *John Fielding* for the wilful loss of the vessel] they, to have their revenge, proceeded by original.

On the other hand, proceedings in the Exchequer, for a discovery which may charge parties with a felony, are extraordinary indeed.

Certificate.

CERTIFICATE of marriage not evidence, unless it be shewn as a copy from the parish register.

Bail.

A Man cannot be objected to as bail, for not having been assessed to the poor's rate; for it is only evidence of his being an housekeeper.

Evidence.

ON a question, whether a promissory note, in the hands of an executor, were the testator's hand-writing, he refused to produce the note.

[529] Lord *Mansfield* informed him, that if it had been *nisi prius*, which had turned on such a matter, he would have ordered the cause to stand over.

The attorney who drew the will was interrogated, whether he would make affidavit, that he believed it was the testator's hand writing. He declined doing it; but would have

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have falsified the hand by other witnesses : This the court declared would be abominable, and would not suffer it.

Execution.

WHERE a judgment is above a year old, you can't proceed to execution upon it, without first reviving it by suing out scire facias.

Non Procedendo.

YOU cannot have a non procedendo for want of transcribing, till you have a certificate from the officer in the Exchequer, that there is no transcript.

Attorney.

LORD *Mansfield*—I don't know whether it would not be a good rule, for the masters of each side not to allow an attorney any disputed items, if he says he does not keep books.

Summary Proceedings.

AN application in a summary way waives trespass, as an action for money had and received waives damages.

Warrant of Attorney.

WARRANT of attorney given by a feme sole. She afterwards married. The court granted leave to enter up judgment in the name of the husband and wife.

Payne against Hill.

[330]

Building Act.

IT seems, that by the construction of the 12 G. 3. the offence is committed as soon as the wall is finished, in a manner contrary to the act; but at least, when the shell is finished, after which, nothing done to the inside can make an alteration; especially as the action is to be brought within three months.

B b

Limitation.

Limitation.

IT was observed, that a year was the common limitation in acts creating penalties, where a moiety went to the informer, and a moiety to the poor of the parish.

Broker.

ACTION brought by a broker in his own name, for his principal. The jury found accordingly for the principal. Contended that verdict shall not be disturbed because action in the name of the broker.

That a broker is a sufficient agent for the parties, within the meaning of the statute of frauds; and his note a sufficient note to bind the bargain: Especially as the defendant made credit with the *East India* company on this note.

That in chancery, where the defendant might have availed himself of the statute of frauds, if he answers to the bill, instead of demurring, the court of chancery will decide according to the equity of the case.

That where a contract is in part executed, court of Chancery will decree a specific performance.

That where note is signed by one party, but in possession of the other, there are several cases that both shall be bound.

Hatton and Grey, Chancery cases, 264. *Vern.* 221. [See *James Lowther and Carill*; but note here, the court did not absolutely decide.] 2 *Eq. Ca. Abr.* 45. *qu. v.* 20.

[331] Where an agreement made by parol, and there is evidence of that parol agreement in writing, this is sufficient to bind the contract.

Countess Dowager of Montacute v. Maxwell, *Str.* 236. [Note, there the ground seems to have been that the marriage was had in consideration of the promise.]

[But vide *Peere Williams*, 618, where the same case is reported, and determined, that to make the marriage a performance in such case, would be directly against the meaning of the statute.]

That the decision in a court of law would be the same on the statute of frauds as in a court equity, as to the rules which would govern it, though the method of applying for relief, and the mode of giving it, and the subject of jurisdiction, might differ.

Lord Mansfield—Question is, Whether this case is within the statute of frauds?

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The very title and the ground on which that statute was made, have been the reason of many exceptions against the letter of the statute.

And I agree, that every construction of the statute which would be good in a court of equity, will be good in a court of law: For equity can't relieve, against the legislature; and every court of law is bound to construe according to the intent of legislature.

Vide the great case of Cowper and Cowper, 2 Peere Williams, 685, 686.

I have already said if the party owned in writing, the case of *Hutton and Grey* would hold here.

As to parol evidence, such would let in a great tempest of perjury; but there is no occasion to parol any thing.

This man is the broker that buys for the defendant; this is the man that buys for the *Russian*, the plaintiff.

When they go on speculation, one man goes and commissions the broker to buy, at such a price, for he thinks it will rise; another comes to the same broker to sell, for he thinks it will fall.

But then there is no evidence, you say, of the order. The note, of which the defendant availed himself before the *East India* company, says, "I have bought, [stating the quantity and price] by your order, and upon your account, for myself."

If there were any doubt, which would not be sufferable [332] when the man has availed himself, parol evidence came very properly.

The ground I go upon is, that it is by an Agent who acts by Authority, and whose Note in writing is the Note of the Parties. This will take it out of the Statute of Frauds. Farther, if it were necessary, it is out of the Statute, because a Note signed by one, and in possession of the other, amounts, in this kind of case, to the same thing as if the party in possession had signed it.

Mr. Justice *Aston*—In such cases, they should not charge a declaration upon parol evidence merely; unless, as here, in support of his acceptance of the note.

Mr. Justice *Willes* spoke principally of the acceptance for the defendant. If he had not meant to be bound, should have immediately returned it.

Mr. Justice *Asbhurst*—That, in the truth of the case, the *Russian*, and not the broker, was the buyer.

Vide the case of *Colt v. Netervell*, 2 Peere Williams, 304, 305.

Common Pleas, 18 Nov. 1773.

ON a motion for a new trial, in ejectment, the court observed, they were always very strongly inclined in favour of the possession; and in courts of law, as well as in courts of equity, the tenant is considered as a purchaser, for valuable consideration.

Plea.

ACTION on the case on promises. Rule for liberty to plead non assumpsit generally; and the plea of the statute limitations, videlicet non assumpsit infra sex annos.

Declaration.

IT seems to be the rule, that declaration is not to be delivered to the party himself. when there is an attorney.

Plea.

[333] **I**F a plaintiff has a right to demand a plea in Trinity term, and omits to demand plea during the whole vacation, question, whether this was not giving the defendant farther time.

Per curiam.

It is the practice of the court, that a delay to demand a plea does not hinder your signing judgment the day after you demand your plea.

Irregularity.

YOU must not overpass a term, and, on account of irregularity, avail yourself next term.

But Mr. Justice *Blackstone* seemed to have observed, that you might wait till the other party signed judgment, and shewed that he meant to make use of the irregularity.

Declaration.

BEFORE appearance declaration cannot be taken to be in chief; but must be de bene esse, or nothing.

Irregu-

Irregularity.

IN a case where a party who appeared to the court not to have merits, complained of being surprized by something, which he called an irregularity, on the other side, and of which he had delayed to complain in the usual time.

Per curiam.

If there has been a surprize, all the consequence is, they have been surprized into doing justice earlier than they intended.

Appearance.

[334]

IT seems to be a rule in the Common Pleas, that when plaintiff has entered an appearance for the defendant, all subsequent notice must be delivered to the defendant himself.

Replevin Bond.

QUESTION, upon application to relieve from the penalty of a replevin bond, it was much doubted, whether such relief could be extended.

B. R. 19 November 1773.

Bail.

TO be put in on the return day of the distringas ; for you can't move till the next day.

Mayor and Burgeses of the Town of Berwick
upon Tweed *against* Johnson.

ACTION of trespass on the case on Letters Patent granted in the second year of *James* the First to the Mayor and Burgeses of *Berwick upon Tweed*; which letters were read in court, verbatim, and were in effect as follows, as to the point in question :

“ That no person not of the gild shall make merchandize without the consent of the Mayor and Burgeses.”

“ And

“ And that no stranger, without the gild, shall sell, except in gross, within the said borough, &c. unless by the consent as aforesaid.”

Act of parliament 2 Ja. c. 28. confirming the charter, and providing, that no person who is a stranger, extraneus, shall make merchandize, &c.

The defendant was a native of *England*, had lived twelve years in *Berwick*, and served the public offices; and upon his carrying on trade within *Berwick*, this action was brought.

[335] Argued, that at this day such a charter would not be good at Common law.

Yet that not every charter not according to the course of the common law, is void; for there are many customs derogatory to the common law, which may be presumed to have taken rise from the charters of some or other of our kings.

It must have been observed, that by the 16 R. 2. and other statutes, no person may buy or sell in any city, who is a stranger.

And that the king's charter to the contrary shall be void.

The case, therefore, is to be considered on the act of parliament, entitled, “ An act for confirming the King's charter to the Mayor and Burgeses of *Berwick upon Tweed*.” It cannot be said, that the only intent was to make the charter good against the King, his heirs, and successors. It stands generally and absolutely to confirm.

Long cotemporary usage may justly weigh in the exposition of a doubtful act, or doubtful point; but sure, it cannot be applied to subvert the express, plain sense of an act which binds the King and his successors, and this court.

It was conceived, the benefit of this act might be waived for a time; and, to prevent prejudice to the right from this non user, it was provided, that persons excluded by the former part might make, and carry on, their merchandize, with the good will and liking of the Mayor and Burgeses. They knew this indulgence, or connivance, might be determined whenever the Mayor and Burgeses should choose; and had no idea, an act of parliament (especially with this provision, not necessary, indeed, but added, *ex abundanti cautela*) could become obsolete by any negligence or connivance.

That *nemo mercator qui sit extra gildam*, and *nemo mercator qui sit extraneus*, are words tantamount: And that the parliamentary confirmation expressly extends to every

every thing granted, or meant to be granted, by the charter.

Mr. *Dunning*—That the case having been fully stated, he should only enquire whether Mr. *Johnson*, having lived twelve years in the town, having served all public offices, and borne all the burthen, should be restrained, by the construction of this act, from partaking of the benefit.

Nullus mercator qui sit extraneus must be understood of a merchant *Alien*. There are a multitude of cases where they are so interpreted; and none that I know where they stand for men who are not freemen of the place, simply, without other words. [336]

If any other meaning be given the words of this charter, this charter would be illegal; and then, according to the general rule, when there are two constructions, the legal will be admitted. * If this extends to all the King's dominions, and was not supported by a precedent statute, it will be void; but if it is restrained as aliens, it will be good, and conformable to the 16 R. 2.

But you will say, why, if there was an act of parliament already, was this granted as a special privilege? I do not know how far the particular situation of *Berwick* might exempt the town, or be supposed to exempt it from the benefit of the general act; but I don't rest my cause upon that point: I think I shall be warranted to maintain my case, if I prove that nullus qui sit extra gildam, and the other, mercator extraneus, are two different qualifications; and that the latter extends not to natural born subjects of the King, resident within the town of *Berwick*.

That this act will have a different construction from the generality of those which are made in restraint of trade, if after having lain a dead letter for 170 years, it shall now, for the first time, operate in so extensive and extraordinary a manner.

That no customs were confirmed by the act but what existed before.

On the other side, if mercator extraneus means aliens, what is the meaning of the other words, qui sit extra gildam.

There

* Verba semper accipienda in mitiori sensu, ut res magis valeat quam pereat.

Nulla inhonesta aut illegitima præsumentur.

Rex præsumentur omnes leges regni sui nosse et habere in scrinio pectoris sui.

There is no other sense, I apprehend, of the word extraneous than as more generally expressed in the charter of the city of *London*: Strangers or aliens to those of the city.

That the court would not consider the propriety of the charter, or the particular wisdom of the legislature; but what the charter meant to grant, and what the legislature intended to confirm.

Lord *Mansfield* said, he should be glad to have a full copy of the charter.

[337]

To prove extraneous here, meant a stranger inmate, he observed it had been said, that extraneous was a word that requires words of explication; and here there are such words.

That he would not put the parties to an argument, as it did not turn on argument, but on the construction of the charter.

The usage is very strong in this case, as existing ever since the statute: And I can't help observing, that it's granted, "that they have a gild, &c. as heretofore used." The preamble seems to refer to the usage precedent.

Mr. Justice *Aston* seemed to think, from the uninterrupted usage, that perhaps it might be presumed there was a by-law, by which the Mayor and Burgesses had declared their good will and pleasure that a foreigner might trade.

Afterwards, in the same term, 23 Nov. Friday, Lord *Mansfield* delivered the opinion of the court, to the effect as follows:

This is an action of trespass, which the corporation of *Berwick* have thought fit to bring against defendant, for selling goods in a public shop, by Retail, at *Berwick*.

They ground upon the charter, that no Stranger in *Berwick* shall sell by Retail.

The Facts material to be stated, and they are very material in such a case, are these:

That the defendant, about twelve years ago, came to settle in *Berwick*, and exercise without prosecution, or any reprehension, the trade of selling Stockings, &c. by Retail at *Berwick*: that he had continued so doing ever since, and that the custom hath been so for all Inhabitants.

The Charter and Act of Parliament is referred to.

The Question is, Whether the Inhabitants of *Berwick* have Mistaken their Charter ever since, and this is a new discovery, or whether the Right Construction has been put upon it.

The

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The Restraint is so pernicious to Public Policy, that the King is restrained by several ancient Acts of Parliament from granting such Privileges.

This is a Charter granted by *James* the First. From [338] *Edward* the Third, downwards, this Town had many Privileges.

There had been a Doubt, whether *Berwick* belonged to *England* or *Scotland*. On the Union of the Two Kingdoms this Charter was made.

A Bye-Law was made for the *Regulation* of the Burgesses, and also for Inhabitants with the borough. There is a clause which obliges the Burgesses to be resident within the borough, *comorantes et residentes*. The custom, indeed, has since prevailed otherwise.

The Burgesses also are made liable to payment of Scot and Lot.

The Latin is somewhat worse, I think, in this Charter, than in that of *Edward* the Third: Worse, indeed, I think never existed. The more a man understands Latin, the less he will be able to understand this.

The clause supposes, that every man of the Community, inhabiting and resident, and liable to bear the Burthens, (which were very great in a Frontier town) may Trade, buy, and sell Freely. *

There seem to be two objects; one to confirm their Privileges, the other to grant them new.

The first Clause is to give them a Gild, in such manner and form as they have Used or ought. *Ita quod nullus mercator extraneus qui non sit de gildâ illâ faciat aliquam merchandizam nisi de Grosso infra Burgum prædictam.*

Now in the translation, as they translate it, it stands thus: "Make any merchandize, by buying or selling within the precincts, &c. I don't know where any Latin can be found, that *facere merchandizam* should mean buying and selling. It is mere balderdash: We must find out the meaning—he means to grant them farther Privileges. "*Volumus atque jubemus et per præsentis concedimus quod quicumque mercatores Petierint Burgum prædictam cum mercatura Sive Extranei Sive Alii qui sint in Pace Nostra de Quocunque Loco.*" A provision follows, that they may be at Liberty, *eundo redeundo, &c.* And then farther, speaking of the Foreign traders, *quod non occasionentur propter Mis-telling in loquellis suis: Et quod Nullus Mercator qui sit Extraneus et*
Non

* Qui sentit onas sentire debet et commodum.

[339] *Non de Gilda mercatura predicta aliquod Mercimonium faciat, nisi de Grosso.* That is, if a merchant living out of the town comes, he shall Sell only in Gross, and not in Retail.

It is implied, mercator Extraneus may be de Gilda; if he is Not, then for the Benefit of the Inhabitants of the Town he is Restrained.

Held that long and constant usage would be a ground of presumption against positive words of a bye-law, or very strong ones of a charter, especially if the charter was in restraint of trade.
Maxim.

This seems to be the Meaning of the Words of the Charter. If they had been much less strong (though I am so far from thinking it doubtful, that I think this is much the better construction) in so disadvantageous a case, I should make no difficulty of construing it thus, Even were it as clear as the Sun, after a Constant Usage of an Hundred and Seventy years, We think it Ought to be Understood, that the Burgeses had entered into an Agreement to Renounce this Privilege. For this is not a part of their Constitution which they Cannot alter; and then, on the Maxim, *Quilibet potest renuntiare juri pro se introducto*, We should have been Determined by the Usage of such Antiquity.

RETURN the POSTEA for the DEFENDANT.

Goodright against Gregory.

Ejectment.

ON a Special Case, reserved from the Assizes of Devon, in ejectment, the case states, that Gregory being seised of a Tenement, agreed to dispose of it to one *Stancumbe*. This was done by a scrivener, in an informal manner, by Indorsement under Seal. It appears, that the Indorsement was not Stamped, and no Form of Delivery. This action is brought against the Daughter of the vendor by a voluntary Conveyance.

Mr. Buller—I apprehend the only question is, whether this Indorsement be a Deed; if it were, the conveyance is clearly void by the act. The Definition of a Deed is, “a Writing under Seal;” which this is stated to be.

If any thing is wanted, it is a delivery. I apprehend this is a Delivery in Fact: And no Words are required, which, perhaps, distinguishes a Deed from Livery of Lands.

Coke, c. 5. f. 5. says, Tradition is only necessary; otherwise a mute man could not deliver a deed. Vide *Co. Litt. c. 7. 7.*

On

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On the other side, That this writing was not intended, nor is to be considered as a deed. Every writing under seal is not a deed; for then a will would be a deed if it were only sealed; a letter, under seal, would be a deed. [340]

If it had been meant to be delivered as a deed, it would have been delivered after attestation; instead of which, it's delivered before.

No words are used. It's delivered back by the witness to *Gregory*, and by him to the purchaser. Though words are not necessary, yet something, is perhaps, to shew the intent.

1 *Lean*, 140. Debt on obligation; plea, non est factum. The jury found the special matter, videlicet, that the defendant subscribed and sealed the said obligation, and cast it upon a table, and defendant took it up. And the court was of opinion, that upon the matter, the jury had found against the plaintiff; and that it was not like the case where words were spoken, as saying, "this will serve;" for then, by speaking of the words, the will of the obligor appeareth, and that is his deed.

Cro. Eliz. 147, there is the same case, and the same distinction.

Peck, on demise of *Philips*—lessee, in a short memorandum assigned his tenement to another; assignee re-assigned. His Lordship was here of opinion, in this court, that it was a sufficient assignment without Stamps. The want of stamps does not avoid a deed; it only prevents its being produced in evidence, and you may only have it stamped, and pay the penalties, and then it is a deed.

Lord *Mansfield*—It's given in his presence, and he receives the money: It is clearly a deed between the parties; and must be so therefore, as with respect to the Stamp Act.

Mr. Justice *Abbott*—As to the circumstance of attestation, though the solemn form is, "sealed and delivered before us," an inaccuracy in that shall not overset every thing. Cases of Wills stand very numerous to that effect.

I do not see that it was necessary to consider it as a deed. If a man can honestly avoid the expence of the stamps, I don't see why he should not: the Parties call it a memorandum.

Lord *Mansfield*—Delivery only would not make it a deed; for a memorandum may be delivered.

Assignment dated 1768. *Stancombe*, the original vendee, assigned it then; but no possession went with the assignment.

Postea

[341] Postea must be returned for the Defendant, they may get it stamped and bring a new ejectment.

Debt and Bankruptcy.

YOU cannot prosecute notes of hand or bills of exchange by action of debt.

An action of assumpsit, which is a demand founded on implied contract, is sufficient to make a man a debtor within the bankrupt laws.

A. delivers to *B.* who afterwards became a bankrupt, a quantity of saltpetre to be refined. No demand is made till after the bankruptcy.

Quære, Whether this was a debt within the meaning of the bankrupt laws?

Per Curiam held not: because no debt accrued before the bankruptcy.

Perhaps the statutes concerning bankruptcy do much more mischief than good: but we must, while they continue (which perhaps will be for ever) decide according to law*. But this case is very particular. A man deposits his own saltpetre to be refined by a refiner, and be returned within a reasonable time. At the time of issuing the commission, and long after, this saltpetre was still in specie. The plaintiff had waived the delay and indulged him with time. He could not come for the value; for the property still remained in him. He might have had trover; all which could have been recovered was the property itself, and the uncertain damages on a verdict.

Bill.

THE act obliges action upon attorney's bill not to be brought till a month after the bill delivered; in order that if the parties choose to proceed in a summary way they may, by referring the bill to be taxed.

Rogues.

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13 Geo. 1. c. 23. §. 8.

GATHERERS of ends of yarn convicted by one or more witnesses, before one or more justices, to be deemed

* Est hoc per quam durum: sed Ita Lex Scripta.

Est boni judicii cogitare tantum sibi permissum quantum sit commissum ac creditum.

deemed and taken incorrigible rogues, and punished according to the stat. 12 *Ann.*

Walker *against* Chapman.

ON a motion for a new trial, his Lordship read his Report. This was an action for money had and received.

Mrs. *Hopkins* was called, who said the defendant *Chapman* had been page to the King, and engaged in her presence, that if the plaintiff *Walker* would pay 50l. to her, he *Chapman* would get the plaintiff a place in the customs. That she was present when *Walker* interrogated the defendant, whether he would procure the place; and that *Chapman* said he would; or stand for the payment of the money; and that it was the same, whether paid to the witness Mrs. *Hopkins* or himself.

On the part of the defendant, the witnesses spoke very ill of the character of the witnesses against the defendant; and one or two witnesses spoke of the good character of the defendant.

Besides, it was contended that the action would not lie, from the nature of the case, the plaintiff being party to the iniquitous contract: and in *pari delicto potior est conditio defendentis*, the law will not suffer a party to draw justice from a foul fountain.

On the opening of the case, the exception to the competency gave a suspicion of the merits: but on being asked whether he would stand the trial or pay the money, (as the consequence of the matter's coming out clearly so flagrant as stated, would not end with payment, but as he was in such a relation to the court, on his suffering his name so to be tampered with, to give hopes of place, representation would be made to his Majesty, and the consequences were easy to be foreseen) Mr. *Chapman* declared he would stand the trial, let the event be what it would.

The whole transaction is stated to have passed when none were present but Mr. *Chapman* the defendant, this witness, and the plaintiff.

The jury found for the plaintiff.

After the verdict on this motion, the court would not suffer Mrs. *Hopkins's* character to be gone into, as the jury had believed her.

A letter from an attorney was produced, laying as a [343] ground for a new trial the claim in dispute necessities procured

procured from Mrs. *Hopkins* and loss of time, at a sum between 40l. and 50l. This letter was sent to Mr. *Chapman*, and it concludes by saying, that if Mr. *Chapman* did not get her the place, (which he had so often promised her in the customs) Mr. *Walker* would bring an action or apply by petition to her Majesty.

Chapman's affidavit was read, importing that Mrs. *Hopkins*, the only witness against him, was very indigent, and had been supplied by the servants of the court with victuals, goods, and money. And that she, without the consent or knowledge of the defendant introduced the plaintiff to him, who said, "Sir, I am told you can do me a piece of service, and get me a place by speaking to Lord *North*;" "I have served with alderman *Kennet*," or something to that effect. That he, the defendant, said, "he was not so great a man as to presume to speak to Lord *North*;" "that he had no interest to procure any place; if Mr. alderman *Kennet* had, he would give what advice and assistance was in his power, but could promise nothing for himself." That afterwards *Walker* offered him something; which he immediately refused, and shut the door on him; that after this the letter before mentioned, threatening him with an action, was delivered to him; and on his absolute refusal to pay a farthing, another person came, who said he was no lawyer, but was desirous Mr. *Chapman* should pay a little money to get rid of the affair. *Chapman* said, he would have nothing to say to him.

Chapman farther swears, that *Walker* never was desired by him to lay out any money on his account, or advance any money, or procure any necessaries, or the like, for Mrs. *Hopkins* as stated.

Walker swears to Mrs. *Hopkins* having treated with him, and assuring him, that by her interest with Mr. *Chapman*, she could get him a place; that they agreed on a sum; but that he *Walker* required to see *Chapman* first. That accordingly Mrs. *Hopkins* promised to introduce him; that she did accordingly; that he told *Chapman* of the conversation between him and Mrs. *Hopkins*; and that *Chapman* said, if he *Walker* would pay the money to Mrs. *Hopkins*, he the defendant *Chapman* would engage to get him the place, and desired him to pay to Mrs. *Hopkins* any sum not short of the sum of 70l. agreed on for the place, and that he meant it as a present to Mrs. *Hopkins*, on account of the friendship he had for her; that he might depend on the place, or he would stand bound for the money; that *Chapman* said

said it might be necessary to enquire into the character of him the deponent *Walker*, on which he the said deponent said he had served Mr. Alderman *Kennet* for six years, and that *Chapman* might have a character from him; that he hoped *Chapman* did not mean to deceive him, for he was a poor man, and had a large family; that *Chapman*, again, [344] made the most positive assurances.

That these assurances were repeated; that on the faith of them he advanced 50l. by instalment to Mrs. *Hopkins*, and informed *Chapman* thereof, who said he had done very right; again assuring him of the place.

That *Chapman* having put him off several times, he at last found means to come at the speech of him—that then *Chapman* said he meant only a joke, and hoped he had got rid of the woman; and that he should not pay the money; and that if *Walker* came to trouble him any more, he should get him committed. He denies that *Chapman* had ever said he was not so great a man as to presume to speak to Lord *North*, and that he could only promise his advice.

The counsel for the defendant objected, that though *Walker* answers minutely every part of *Chapman's* evidence, (even to the most immaterial circumstances) except only the letter of Attorney, he does not answer that, which must be taken therefore as admitted. It imports a very different ground, namely, necessaries, lodging, &c. at the request of the defendant provided for Mrs. *Hopkins*; that therefore great suspicion of perjury presses upon the plaintiff and his witness. That Mr. *Walker* could not be supposed so ignorant as to imagine that *Chapman* should have the immediate disposal of places in the customs.

That as to the objection on the point of law, Mr. *Walker's* guilt, admitting all he states to be true, puts him out of a state of entitling himself to any relief, he having contracted for a bribe, as to which his want of success makes no difference, nor was ever taken to make any.

That this point of law however was not meant to have been relied upon on opening the trial, and was immediately withdrawn on his Lordship's intimation. Nor did they now mean to rely on it, but trusted the perjury of the witness would appear sufficiently; and the incredibility in the thing itself, that either *Chapman* should undertake it, or *Walker* imagine that he could.

Lord *Mansfield*—As to the objection in point of law, it is of some importance to be generally settled, and therefore I saved this point.

Action

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Action for money had and received—contended that the defendant seduced him to give money on credit of getting him a place in the customs. The money paid—and now taking it thus for the sake of the point in question, that the money was paid in consideration of this contract, yes says the defendant, but the contract is illegal, and therefore I retain your money. And Mr. *Wallace* says very properly the plaintiff comes to be relieved from this illegal contract; and there is a great difference where a party comes to overturn an illegal contract, and to be relieved against it, he shall not be relieved if he comes to take the benefit of an illegal contract; there he never shall be relieved, because to relieve him, the court must affirm the contract.

Vide Eq.
Ca. Ab. 86.

Not only in prohibited contracts, but moral offences, which would subvert the contract, the law will admit of this relief. The law for political reasons prohibits a bankrupt from giving any money to a creditor to obtain a certificate; yet the bankrupt on application shall have the money refunded.

* Namely that money paid by mistake might be recovered on indebitatus assumpsit, but not money on an illegal consideration, vide Salk. 22.

So in the case of usury, when they don't come for the penalty, but to have the money refunded after payment of principal and interest. There was something which seems to have fallen rather hastily upon such a question in *Tomkins* and *Barnet*, * but the later authorities are otherwise, as in the case of *Dalboused*.

The case of *Law* and *Law* is a case almost in point; 'twas on a bond given to a man as a security that the obligor would use his interest with a commissioner of the customs to get him a place in the customs, (for had the party contracting been a commissioner himself, he would have been within the stat. 5 & 6 Ed. 6.

As to the bond itself, I know not whether Lord *Talbot* had any doubt, but he states thus:

Lord *Talbot*—The counsel on both sides say the bond is good in law; therefore I shall determine upon the merits.

(Why they could not say otherwise, without destroying their own case, the objection was on the face of the condition.)

Now, if a condition is void in a court of equity, it will be void in law, as in the case of *Perkin*, bond of submission to prostitution decreed void as *contra bonos mores*—so in the case of *Low* and *Peere*.—Bond, the condition of which was, the obligor should not marry any but the obligee, it was held that this was void and destroyed the bond, because the obligee was not bound to marry him, and therefore

fore against public policy, he might be kept in a state of celibacy.—In all these cases, a court of equity will relieve a person who comes to disallow the contract, and there is no difference between a court of law and equity as to such relief, even when the condition does not appear upon the bond. (I think in all these cases the court of equity adopts that principle which tends most to prevent the mischief. It has been solemnly determined in the Common Pleas, its the same if proved, vide the case of *Collins*. And the reason he gives is almost as great as the authority.) [346]

There is also a case of *Shipley* and *Woodhouse* similar to that of *Perkins*.

As to the letter in this case now before the court, it is very extraordinary it should not have occurred at the time of the trial; it appears now, however. And it is very extraordinary on the other hand that the whole stress of the evidence should lie on a witness who can only be denied by the plaintiff or defendant. This woman is impeached in the only manner in which she can be impeached; by her character. However, as the jury credit her, we should not go into that.

But let us examine farther how she states the payment of the money; she states he paid her 50l. any one would have supposed this sum was paid at once. No: it appears on the plaintiff's evidence he paid it by instalments: farther, it is on a different contract; there she makes it a contract for 50l. for a place worth 70l. the plaintiff makes the contract itself 70l.

Then as to the time of the letter, which is the most important circumstance of all, for when Mr. *Wallace* had got half through, I was pretty clear there would be no new trial. But the time of that letter deserves the utmost attention. I see what the letter conveys, and which may be the truth of the case—lending money to Mrs. *Hopkins*. He lent very probably on credit of her having interest with the defendant. The sum is an unliquidated sum; 'tis not alledged as upon contract, but she boards and lives with him.

An unliquidated sum, instead of a specific sum: this gives the strongest ground for apprehensions, and furnishes great cause for a new trial.

But the defendant having neglected to produce this letter on the trial, the new trial should be without costs.

Mr. Justice *Aston*—The case of *Tomkins* and *Barnet* is so loosely stated, that the reporters seem not to know what to make of it; one states it to have been at *Nisi prius*, the

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other in the King's Bench, as before a full court. And I cannot therefore give much credit to a note so loosely stated of a *dictum*, which is there that money cannot be recovered against a solicitor, so as to oblige him to refund, where the money was given for bribing.

I question whether Bribery in Elections, the growing vice of this kingdom, would not be more likely to be reduced if it were known to be otherwise, and that a Briber could recover against the Bribee.

However, I give no opinion on that—nor what would have been the case if Mr. *Chapman* had procured the place, and *Walker* had brought his action.

But here I take my ground upon the fraud.

Farther, the difference between an unliquidated and a specific sum, between a sum in gross and a sum arising on money lent, necessities furnished and other articles.

The non-answer to the letter now produced, joined to the doubtfulness of the question, makes ground abundant for a new trial.

The not answering this is, I think, an abandonment of the cause.

But the new trial, I think, ought to be on payment of costs.

Mr. Justice *Aspburst*—The case of *Laro* and *Laro* cited by his Lordship is a case in point; and if a Court of Equity would relieve there upon the bond, a Court of Law will relieve here—this to the point of law grounded on the fraud.

Then as to a new trial on the evidence of fact: if the defendant's negligence makes it necessary, as it does certainly, that costs be added, the importance of the case equally makes it requisite a new trial be granted.

Lord *Mansfield*—The case of *Tomkins* arose from the money not having been paid to the man bribed; but its paid to a solicitor to his order. There certainly he shall not recover against the solicitor, but shall take the loss, having trusted the money into his hands for such a purpose.

Certiorari.

RETURN to a Certiorari—upon which the justices to whom the certiorari issued, return order upon the matter in question.

Motion that the justices may return examinations before them.

The

The court would not grant this. And Mr. Justice *Aston* [348] said, that if a conviction is returned, the court never order them upon information to return examinations. Except in cases of Coroners, where the court, as supreme Coroner of the kingdom, will order a return of the depositions as the ground on which they go.

If they return falsely or insufficiently that an action may lie is another thing; but we never oblige them to return to the certiorari evidence before them, such as affidavits, or the like.

Outlawry.

MOTION to reverse an outlawry in the usual way.
Refused—the record not being in court.

Allowance under the Insolvent Act.

MOTION to reduce allowance as being discretionary in the court, in the case of a prisoner under the insolvent act.

The court would not do it; and said they never allowed less than the full sum of 2s. 4d. a week.

Insolvent Act.

WHETHER a person who held a post in the horse-guards could be discharged under the insolvent act, still retaining that post for his own benefit, was questioned.

It was urged, that it was a post which he could not assign, neither could he sell it, unless by permission, and that it was matter of indulgence whether he might sell or no.

Mr. Justice *Aston absente Capitali Justiciario*—My Lord is not here. I spoke to him of it at *Serjeant's-Hall*, and mentioned that it appeared very hard that a person possessed of a valuable interest, tho' not assignable, should hold against his creditors, and take the benefit of the insolvent act. My Lord Chief Baron *Smythe* was present, and mentioned a case of *Richardson* a bankrupt, where, though the interest was not assignable, the court would not permit the bankrupt to have his certificate till he had sold it. And Lord *Mansfield* said he remembered the case. [349]

Michaelmas Term, 13 Geo. 3 K. B.

If he had applied to his officer, and the officer would not have consented, then it would have been different.

Serjeant in Militia.

IT seems the office of serjeant in the militia is not held an interest within the insolvent act, not being vendible.

Time of Payment of the Groats under the Insolvent Debtors Act.

NOTICE given to pay on Saturday objected, because made payable by the act on every Monday.

The court said Monday was only by way of instance, and any other day would do.

• Vide supra, p. 113.

After judgment in the case of *St. John and Errington*,* upon Sir *Brian Broughton's* will, the party who had made the essay of what opinion the King's Bench entertained on his side, finding it adverse, the matter appeared in form.

This case came before the Common Pleas, and was argued pretty largely, rather upon construction, as to the effect which the words must legally carry, than upon the intent.

St. John against The Bishop of Winchester.

On a *Quare impedit*. 29 Nov. 1773. Mich. Term.

IHAD been present at part of the arguments in the Common Pleas, but had taken no note as far as I find, and not expecting it would come on when it did for judgment, I was not in that court till a little after eleven. However, though the Lord Chief Justice had proceeded a little way, I was able to collect the greatest part of the judgment, which was nearly to this effect:

The title of all fees is *prima facie* in the heir, where it originally resides, and must not be taken out of him, unless by express words, or necessary implication.

Vaughan 263.

[350] Here it was very probable the testator did not mean to divide any of the lands immemorially occupied with the farm.

Vide 259, various cases where he shall not be dispossessed but by necessary implication.

Two

Two instances, I think, there are, which may be qualifications of this rule.

One where the description is partitive, and from its several members the entire descriptions of the estate intended may be collected, rejecting as surplusage what is insignificant or superfluous, or does not answer the general and entire description itself, so taken from the several parts, but is inconsistent with it and impossible to be satisfied.

The other, where the description consists of two parts; one of which is a complete description, with which the thing corresponds, and the other not belongs to it at all.

The testator here had an advowson in possession, he had estates contracted for. Is the advowson in question bought or not bought? Wills must be interpreted according to the common sense of words, in the general and vulgar use of them among men. In common language, if a man has an estate in possession, and is asked have you contracted for this estate? No: I have bought it long ago. If asked have you bought such an estate? No: I have contracted for it. Words are to be taken in wills according to the common and obvious acceptance. There is no drawing a line between an estate bought before the will three months or twenty years. And farther, it does not appear there was any contract independent of the conveyance.

Next, this description is not distributive in such a manner as that part will fully answer the circumstances of the estate, and another part not apply to it; for no part applies to it; therefore none can be retained as completely or at all descriptive, and the rest rejected as surplusage.

The words "contracted and agreed" will not express an actual purchase; there must be words interpolated, such as the estates which I have before purchased, and also those which I have contracted and agreed for.

But there is another ground on which, if we agree, the judgment I pronounce will be principally founded. It is the alternative devise, or in lieu thereof, what does that refer to, the entire description before? As to the estate contracted for in *Hants*, there was no occasion to give an alternative of what he could devise; but of an estate which he wished, but could not legally, in lieu of that, the money to arise from the sale in *Lincoln*, which will exactly answer to this one advowson. This estate descends to the heir at law: What the remedy at law will be, is another consideration, and not before the court. The heir at law, however, may be compelled in a court of equity, to sell the estate,

estate, and to receive the money. Next, Lady *Broughton Delves* is to lay out the money, which will buy the estate in *Hampshire*. If the *Lincoln* estate sells for more, the heir at law will have the surplusage, if for less, it will be to be supplied out of the assets.

Now where there is a thing given, and an equivalent instead of it, the equivalent explains the thing. On a computation, the 27,000l. given as an equivalent, will exactly answer the estates contracted for in *Hants*.

I have looked into the case in the court of King's Bench, which is materially different: For there is no mention of the circumstance which concerns the *Lincolnshire* estate. Without any judgment, therefore, or opinion upon that, we are of opinion, the advowson purchased does not pass to Lady *Broughton Delves*. As to the word advowsons, in the plural number; it appears, that the testator used the same word where he had no advowson to pass, but only a presentation to a perpetual curacy; which he might indeed take for an advowson, but to which the same objection would lie, as to the use of the plural number,

Error from the Common Pleas.

In the King's Bench, Trinity term, 4 June 1774.

Mr. *Mansfield*—My Lord, this comes before your Lordship by Error out of the Common Pleas. The plaintiff claims under the widow of testator, as devisee; the defendant under a conveyance from Sir *Brian Broughton*, the heir at law, on a special verdict, upon which the judgment in the Common Pleas was formed. The jury found as follows: The jury find in 13 June 1763, articles of agreement between Sir *Brian Broughton*, the testator, and *A. B.*

Other articles in the same year with Mr. *Pitt*, to convey lands.

In February 1764, conveyance of the advowson to Sir *Brian Broughton*.

Farther stated, that Sir *Brian*, having made this purchase, and having estates in *Suffolk*, *Lincoln*, and *Salop*, and a small estate in *Cheshire*, made his will in 1764. The material part is, "I give all the manor, messuages, advowsons, farms, tenements, hereditaments whatever, in the county of *Hants*, for the purchase whereof I have already contracted and agreed, to my dearly beloved wife, or, in
" lieu

“ lieu thereof, the money arising from the estates in *Lincoln.*”

An estate in *Stamford* he gives to his heirs in tail; remainder over to persons named in the will.

Like devise of advowsons in *Cheshire.*

Verdict states, that he had no advowson in *Cheshire*, or *Stamford*, but only a nomination to a perpetual curacy for the time being.

Question, Whether as to the advowson purchased before the making of the will, Lady *Braughton* is entitled? This will appear upon the intent, and circumstances.

This does not depend either upon cases or rigid rules of law; but on the construction of the mere will.

The sole dispute is not on the quantity of the estate; but on the premises, whether this advowson did pass.

The verdict states in 1763.

In *October* 1763, contract for the purchase, to be completed on the thirteenth of *May* 1764; before which he purchased the *Hampshire* advowson.

He appears then to have intended to give his property in *Hants* to Lady *Braughton*, his *Stamford* and *Cheshire* estates to his heir.

He has given in the most comprehensive manner possible, and used the word advowsons in the plural number. It is contended on the part of the heir at law, that, notwithstanding these general words, they are so limited and restrained by the words, “ for the purchase whereof I have already contracted and agreed,” that their effect shall fail of carrying so extensively as they otherwise must have done. Yet, undoubtedly, every purchase is a contract, and more; and so every man would understand these words, upon the common interpretation.

This advowson had been recently purchased, and therefore he might not so strictly have attended to the distinction.

What would have been the case if he had said purchased? The heir would have said, “ You have only the advowson of *Motson*, the rest were only in contract.” The heir would [353] have been told, that in equity, it was to be taken that the testator, by the contract, had made a good purchase, in the sense of passing it as such; and therefore, *vice versa*.

The words are not satisfied with this construction, if only one should pass. *Bulstr.* 176, “ All my moiety in *Kent*” passed, the one in *Kent*, and another in *Essex*.

Another

Another case, in much earlier days, *Dyer* 376, a man, who on feoffment had conveyed an house, formerly the house of *R. Cotton*. It turned out, *R. Cotton* never had it, but *James Cotton* had; and this was held sufficient to pass the house, though upon a feoffment.

Burr. Goodright, on demise of *Paul*, against *Paul*, Question, upon a will, "my farm in *Bovington*, in the tenure of *Smith*," Question, upon a woodland expressly excepted in the lease of *Smith*, which yet was held to pass.

Mr. Dunning—The question, if there be any, is a question of intention. I find a difficulty how there can be a doubt of the intention. If he has not used the fittest words to express what I conceive to have been his intention, I own, had I been at his elbow, I could not have furnished him with better words. I admit, that the words which stand first are so general, as to pass all his estate in *Hampshire*; but the following words, I think, have just the same effect as if, having given the whole of a thing in the beginning, he should expressly restrain that whole to one half.

He gives Lady *Broughton* money, to carry the contracts into execution; therefore this was given as an equivalent, in case any doubt upon title; not in order to purchase what was purchased already. I don't know the question can be made clearer than on the words of the will.

But *Mr. Mansfield* says, it's a contract and more; it's one of those mores which does not comprehend but exclude the less. It was near the purchase; might it not have been much more remote? The purchase was made complete about four months before the will; can the construction upon this will depend upon the date? If they had been purchased thirty years before, would it have made a difference? If the purchase was preceded by a contract, this, it is said, may make a distinction. I don't know that was the fact; nor is it upon evidence, and probably there was none; nor do I care if there were: For a thing purchased, preceded by a contract, or a purchase without any precedent contract, will make no difference in this respect. The method to have removed a doubt would have been, not to have said purchased simply, or contracted simply; but he would have said, "for which I have contracted and agreed, " or purchased." But even if the word had been purchased, a contract would be considered as a purchase, and executed as such, by a common application on the other side the Hall: But I deny the terms are convertible; or that a purchase

purchase will be implied to pass by words, which pass expressly an estate in contract.

Not only words, but every letter of the will, must have its effect given, and that at the expence of expunging whole sentences; especially that "for the purchase whereof I have contracted and agreed." I will only say, the force of this I can't conceive, with respect to operative words, and which can be brought in only to have their operation, and not *currente calamo*; whereas, on the other side, one may easily conceive how the letter *s* might come in by accident, or oversight, or of course merely. I think my friend was not guarded as usual, upon the whole of the case, when he said inaccuracies are not to be regarded. I will beg the court may use them as they always do, reject them: But I think they may reject the letter *s* as coming in as impertinent, rather than whole sentences in different parts of the will, evidently material, and which cannot come in by accident, or of course. And there can be no prevention of dying intestate; which, if it be an evil, he must do at all events, as to some parts.

He uses this word advowson in the counties of *Cheshire* and *Stamford*; and I should have thought it thrown in generally, among words comprehensive of every possible species of property, if he had not mentioned tithes; but at least, it shews that he was mistaken in the one instance, for he had no advowson in these counties, though he had a donative. Why then are we obliged to suppose, in the other instances, that he was more precisely acquainted with the state of his property? These two instances cannot be said to be immaterial: And they were not in the case upon which your Lordship decided.

Mr. *Mansfield*—I find we concur perfectly, that all wills must be interpreted by his intent who made them.

I don't agree that the words, "contracted and agreed," are as effectually restrictive as if he had said, after words passing the whole, that he gave only half.

Lawyers may understand the difference very clearly between contract and purchase; and know that the contract, being completed, sinks in the purchase; But I was contending for what is the common sense and language of testators.

With respect to the words which pass the estates in *Stafford* and *Cheshire*, I should think the argument runs rather, that he used general words in both instances, meaning all the estates in those counties should pass to his brother; as in the other to his widow. I do not think it proper to make
any

any argument upon the former judgment of the court; as knowing that if the case were the same, it would have no effect upon what shall be now determined. If it was not the same, it will have a different construction; if it were the same, then and now, yet still, if the court thought the judgment wrong upon which the question turns, they would have no regard to the former decision. I declare, I can see nothing that makes a distinction. What I rely upon is, he meant the estates in those counties before named should pass to his brother; in the other to his widow.

Lord *Mansfield*—If this case came before the court exactly in the same circumstances as before, the opinion then given would have no influence upon the present determination. On the contrary, the authority since would greatly shake that decision. An heir does not take by intent of testator; but for want of being excluded.

The heir cannot be disinherited by probable conjecture, or what is called in *Gardiner* and *Sheldon* possible implication. I have struggled as far as I could to be of opinion with the determination now before us; and but yesterday I had brought myself to be satisfied: But, on having the case before me, and finding what the argument was strongly grounded on in the judgment, of an equivalent given, is a mistake, I am returned to my former opinion.

The whole question between us is, whether the word advowson had a meaning; and that meaning understood and applied, then the consequence will follow.

If he had said “the advowson of *Moson*, and the advowson of *Abbot's End*, for which I have already contracted and agreed,” there could not have been a doubt upon a recent purchase. Question, whether the word advowsons, in the plural number, is to be rejected?

I have no doubt, it might have been upon argument both of the subject matter, and argument upon the intent. In family estates they go as general words; but in this case they were particularly circumstanced.

Whether to gratify himself, or his wife, he had a mind to make a purchase in *Hampshire*, where he had no family estate, and sell in *Lincoln*, for that purpose he enters into contract; and for the same he gives directions in his will.

13th June 1763, he contracts for lands in *Hampshire*, to the value of about 13,000*l.* covenant to be completed 13th of May, 1764.

13 October 1763, he articles for other estates, and an advowson; 7000*l.* paid down on the 25th of March 1764, till

till the money was to be paid [14000l. I think, was the sum, there or thereabouts.]

25 February 1764, he purchases the advowson. There are then three different sorts of estates, which he had to dispose of, one upon articles wholly executory; another upon articles not wholly so, because a third part of the money had been paid; the third under actual recent purchase.

To this last the drawer of the will must have been privy, as the interval was between the third of February and tenth of April, when the will was made.

The drawer meant to comprehend them all in general words. He says, therefore, "for the purchase whereof I have already contracted and agreed." If he had said only contracted and agreed, that would have excluded the contract, where a great part of the purchase-money had been paid. Then he brings in the word advowsons, and he takes in all he has in *Hampshire*, with the utmost generality.

Now shall this be set aside, because he has said, "for the purchase whereof I have already contracted and agreed?"

What was greatly relied on in the Common Pleas; and led me to think I should find reason to agree with that judgment was, that he has given an equivalent.

That he meant only the mere executory contracts, because he has given, in lieu thereof, the money from the sale of the *Lincolnshire* estate. Now the equivalent must be understood co-extensive with the thing for which it is to be an equivalent; and the 27,000l. from the sale of the *Lincoln* estates, will just amount to the purchase of the estates under contract, executory in *Hampshire*. But, looking into the will and verdict, I find there is no such thing. It cannot be an equivalent; for this, because 7000l. was already paid. He gives that, and so much more money as shall be necessary: Then it is not an equivalent, but is to carry the purchase into execution.

What does this mean? He could not but have in view this would be carried into execution before his death. The time was elapsed. It is merely that he gives her as much more as shall be necessary to complete the purchase of whatever of the estates intended for her should happen to be unpurchased at his death.

The whole then is, whether there are words in the will. [357] It is manors, lands, and advowsons. Now we must reject the word in its literal sense, and suppose they did not understand what the word meant. No argument arises from what

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what relates to the devise in the other place: For all it proves is, he meant in once instance to give the whole to his brother, in the other to his wife.

Mr. Justice *Aston* expressed his opinion upon these grounds, amongst others, that the question was, whether subsequent words shall restrain the effect of the plural of the word *ad-vowson*: That, he thought, the words which followed in this case ought not to take away the efficacy of the former.

That the great stress of the argument in the Common Pleas laid upon the equivalent, does not apply. Therefore, with his Lordship, upon the manifest words and intent, that both will pass.

The other two Judges were of the same opinion.

Judgment in Common Pleas REVERSED.

On Appeal to the HOUSE of LORDS, the Judgment of the King's Bench was AFFIRMED.

Attorney.

HIL. 1768. RULE. It is ordered, that the master be ordered to prepare the proper book, and that every attorney in the cities of *London* and *Westminster*, or within ten miles, shall enter their names and place of abode, or such other place within the cities of *London* or *Westminster*, where he may be served with notice. And that service shall be good where he was last entered. And if any attorney neglect or disobey to enter, then service at the master's office shall be deemed good service, except where personal service is required.

The alternative in this rule—place of abode, or such place, &c. where he may be found, was objected against. But Mr. Justice *Aston* explained, that there were many attornies, who had no fixed certain place of residence; that therefore, such place where he might be served, though not his actual place of abode, was mentioned. But where name and place of abode is entered, then service at that place is the proper service.

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RULE, *Mich.* 10 G. 2. Upon all process on the first and second day of the term, the declaration must be delivered conditionally, on the return day.

Essoign Day.

FILING a declaration on the Essoign day of the term is not to be a declaration as of the term itself.

Right

Right of Soil in an Highway.

ON a question of a right of soil in an Highway, it was contended, the presumption was in favour of the freeholders on each side, and not of the lord of the manor: Evidence of ownership was offered on behalf of the lord. The judge who tried held it not sufficient to repel the presumption. On the motion for a new trial, contended, that the jury should have found upon this evidence: And that all presumptions of this nature admitted proof to the contrary. Thus taking gravel, &c. was a *prima facie* presumption of the right of the soil.

By the 5 *Eliz. c. 13. f. 3.* surveyors of the highways may take rubbish, or any the smallest broken stones of any quarry or quarries within any parish where they are surveyors, for the repair of the ways within their parish or limits, without the controul, licence, or consent of the owners. Therefore taking stones, &c. away, does not prove a right of soil conclusively, against evidence that they took as surveyors.

Possession is evidence of property: But if possessor will acknowledge he is in for another, that is evidence, not only against himself, but against all mankind.

Passing over another's ground is, *prima facie*, evidence of a right of way; but you rebut this if you prove he asked leave.

A gate cross a road is a nuisance, unless it be an ancient gate, but not then, though a modern would. And a nuisance shall not be presumed, because that would be presuming criminality, which the law never doth presume.

As to the presumption of the ownership of the soil of an ancient highway, whether it be in the lord of the manor, or in the owners of the freehold on each side.

Brooke, tit. Chemin. Plac. 10. Note, by all the justices, the king hath nothing in the highway but passage for himself and his subjects; but the freehold is in the owner of the soil.

[359]

Another case, that the soil and freehold of the highway belongs to the owner of the lands of each side, and therefore he shall be obliged to cleanse the ditches.

1 *Roll's Abr. 392.* Generally, the owner of the soil on both sides the way shall have the trees growing in the way.

Contended, on the other side, that the presumption in all cases was, that the lord of the manor was owner of the soil.

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soil. The lords of manors, from time immemorial, were owners of the soil. If no other right of ownership has been exercised, the right continues where it was.

Brooke, Chemin. Plac. 11. Note, where a man gives a manor, the donee of the manor hath the freehold and soil of the highway, and might have distrained, but is prevented by the statute, *Et ex hoc sequitur*, that the lord of the manor is owner of the soil. *Keilway*, 141.

Lord *Mansfield*—My great doubt in this case is, whether the jury exercised any judgment upon the evidence, repelling the presumption. As to the presumption, I think the principle of the more modern authorities is rightly taken, that the presumption is in favour of the lord of the manor, even though the highway may be more ancient than the grant of the manor. If no body can say they have any argument or proof of property in them, then it belonged to the crown, and passed with the rest of the lands.

But if the roads passed through the property of others, and are so ancient that no body can say when they were made, or speak to property, the only question is, where is the first presumption upon that naked, strict, abstracted case.

I think the reason of the thing is, when the naked presumption stands stripped of evidence, that it is in the owner of the land on each side. But this is only such a presumption as is not like a title. Acts of ownership against a title once clearly established, would not have been set up, so as to avail against the title.

For the sake of certainty (and it does not matter here how it is determined, if there be a certainty) the presumption is in favour of the owners on each side.

[360] But there is also a presumption in favour of the lord—How does the presumption stand in favour of the lord? There is an under-tenant in one of them, who pays to his immediate assignor, who pays over to the lord.

A tenant applies for leave to pull down one of these cottages, because he has not room to turn.

These are recent instances, and presume more ancient acts of ownership.

Another agrees to pay five guineas for gathering coals on the soil; but then thinks it not worth his while.

This is strong evidence. The nature of all evidence is, that contrary evidence, if to be produced, will take off its weight: But here is no such contrary evidence. I imagine the jury took it as a direction for a nonsuit.

Mr.

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Mr. Justice *Gould* having stated to them that the evidence was not strong enough to repel the presumption.

On these circumstances, and the ground of it's being a question of right of property, rule granted for a new trial, but on payment of costs.

Entry.

Doe, on the Demise of Davenport *against* Duncan.

ON a rent charge, arising from coal mines, with clause of re-entry for arrearages, entry held not necessary to maintain an action, unless to save the effect of a fine, in which the statute of 4 H. 7. made it necessary.

Bur. 1895, was cited. Lord *Raymond*, 750. And 14 G. 2. c. 28. which provides, that in all cases between landlord and tenant, without any formal demand and re-entry, the sheriff shall and may deliver possession. And it was argued, that this statute was a constructive declaration of parliament, that the case in *Salkeld* and Lord *Raymond* is law; namely, that wherever you can enter, you must; and that you must gain the possession by entry, before you can part with it. And the counsel who contended for the necessity of the entry said, he could not find to the contrary any case, or any thing, on any general principal law.

Lord *Mansfield* asked what was the reason of the distinction [361] between non-payment of rent and the other cases.

Mr. *Davenport* took a distinction, and said that, on condition broken, the estate in this case was said to revert, which he apprehended, was an incorrect expression, for that the original estate continued; but where the grantee had no estate in the lands, but merely a naked power of re-entry, there he must enter, or have no action.

Mr. *Wallace*—That the re-entry was not one in form, and actual, but an entry in law:

Where an heir should enter, and some body enters before him, the old doctrine of abatement ‡ and intrusion is not
‡ Abatement is where one enters after the ancestors, before the heir. Intrusion is where one enters, or continues in possession, after an estate for life determined, to the prejudice of remainder, or reversion. There is also disseisin, which is an unlawful entry, and ouster of him that hath actual seisin. Usurpation, where one who has no right to present, presents to a church, and his clerk is admitted and instituted, and continues for six months. Discontinuance is where he who has not the full right, aliens, and puts the party injured to a real action. Forfeiture, properly, is where he who has no right, has recovered against the person who hath the right; or holds possession from him who hath the right of the property, but never had the possession.*

* Vide Hale's Analysis, s. 43. Co. Lit. and 3d Commentaries.

now so held, that a counsel upon a circuit would give advice to make an actual entry. What end of justice is it to answer ?

Fines, I own, have a technical reason, with respect to entry. It appears by *Coke*, that their operation is to divest all legal possessions, and reduce them to a bare right ; therefore you must enter to re-vest the possession.

In case of vacant possession, the old form was, you must enter and seal upon the premises ; but if there was any person to confess properly to the ejectment, it was not necessary to use this form ; and the statute seemed to have intended only to determine as to vacant possessions. Or suppose the meaning to have been otherwise, might not he argued the legislature, in that instance, in a case between landlord and tenant, and the parliament, more composed of landlords than lawyers, might not they think they were making law, and not advert that it was law before ?

Lord *Mansfield* observed, this often happened ; and that there had been a case, where Sir *Eardley Wilmot* cited several instances of it ; and that it was particularly likely in this case.

Lord *Mansfield*—I was upon the trial, and continue clearly of opinion, that re-entry was not necessary, except to avoid a fine ; and there it is necessary, by the express words of the statute. If ejectments had been known then, in the use to which they are now applied, the legislature would, probably, have mentioned them.

[362] But, to make an entry necessary here, would have no other effect than that of obliging to a troublesome ceremony, to take the chance of it's being omitted, or informally executed, to turn the party round, and avoid a just debt.

'Ludlam on the Demise of Hunt.

In Ejectment.

ON a case reserved from the *Leicester* assizes for the opinion of the court.

This was upon the will of *Samuel Ludlam*, in 1738.

His power of making the will turned upon the validity of a will contended to have been made by his father, in 1684.

A question arose, whether a copy of this will, from the spiritual court of *Leicester*, could be admitted, which was the principal point submitted.

And

And it was argued, that no rule of evidence was more clear and certain than that when a deed or will is to make a title, the deed or will must itself be produced, and not a copy. And that ever since the case in *Rolles*, so it hath been universally held, and that upon many and good reasons, and in conformity with the statute of frauds.

That though it would be too much to say, that on all occasions the evidence of a copy should be refused, yet, that there must be very strong reasons to admit of any thing that might any way seem to tend to the prejudice of so general and useful a rule. The copy comes from the spiritual court, but the hand and seal of that court is not the proper evidence here, to prove the authenticity of a will by a copy.

Possession has gone ever since as it would have gone without the will.

There is no other evidence of the will but this copy; and, by the nature of the thing, a will is generally capable of other evidence.

But the mark of the executor (for he did not write) is pretended to be compared to the mark he used to affix to other instruments. This was a mark set to a bond given to the spiritual court for producing the will.

There is no ground in authority or reason for admitting [363] comparison of marks.

That it appeared the will was never in possession, if it ever existed.

That in favour of the heir at law where circumstances were doubtful, the court would incline always.

As to another objection, which was, that this being in *Knareborough*, and lands inclosed there by act of parliament, the act of parliament should have been produced.—It was answered, that ejectment being a liberal action, and they having only the lands in question, they could confess for no other.

On the other side, that the rule which held in all cases was only to take the best evidence of which the case would admit.

And if there has been no possession under the will, there has been no such adverse possession as might be evidence towards inducing a presumption against it.

Lord Mansfield—The case is clear—a man by losing the evidence of his title shall not lose his estate. If you cannot prove a deed by producing it, you may produce the counterpart; if you can't produce the counterpart, you may produce a copy, even if you cannot prove it

to be a true copy; if a copy cannot be produced, you may go into parol evidence of the deed.*

When possession had gone against a will for most part of thirty years, and the will from that time, the time of its making, never appeared, the evidence of the will went beyond the possession.—And here all the family are evidence to this will, by signing the security to the spiritual court, by allegation, by all kind of judicial proceedings, and the possession has not been adverse to the will.

Mr. Justice *Aston*—Evidence from the register-book has been received in two instances. The court of Chancery in the case of *Gorges* and *Foster*, decreed that the copy or probate of a will should be received in evidence as the original will itself—Now the court of Chancery never decrees that shall be evidence, which in its nature is not evidence.

[364] Lord *Mansfield* observed, that it being stated all the subscribing witnesses were dead, the last in 1736, comparison of hands was all the evidence which could be given.

Separate Fishery.

THE presumption is, that he who has a separate fishery is owner of the soil. Vide *Skinner* 342. *Salk. Brook*, title *Peschariæ*. *Co. Lit.* 121. *Roll. Abr.*

This was upon a case reserved, which was therefore observed to require a finding much less strict and circumstantial than a special verdict. And Lord *Mansfield*, I think, was of opinion, that notwithstanding Lord *Coke's* observation, the presumption certainly was, that the man who hath several fisheries is the owner of the soil; and that Sir *John Davie* observes upon *Coke's* objection to the contrary, and denies it expressly; and then if there is no evidence to the contrary, the presumption stands.

Mr. Justice *Aston*—That notwithstanding the *dictum* of Lord *Coke* (who yet admits that by the words *aquam suam* the soil will pass) the case in *Salkeld* 637. Case in *Brooke plac. trespassse* cited by Mr. *Wallace*, and another still stronger 436. with Sir *John Davie* go to the contrary.

Curia omnis assensit.

Justification.

WHEN three persons join in one justification, the justification is good for all or bad for all. *Str.* 1104. quoted. Tenant

* Evidentia est optima quam res recipiat probatio; in qua si summa deficient vel ad minora liceat decurrere nunquam autem per infirmius probare licet; neque ubi fontes suppetant rivulos sectari.

Tenant from Year to Year.

MORTGAGEE serves the tenant with declaration in ejectment, the tenant defends to the ejectment, under colour that if he did not defend, he should be turned out.

Contended, that ejectments by mortgagees are not considered as claims under an adverse title, but as means of coming at the rent, and therefore notice of ejectment is not necessary in such cases in that manner which is required, where a landlord turns the tenant out.

The defence on the part of the tenant was called by [365] Lord *Mansfield* a most wicked defence; and he said, that such an objection was never made before as the present. The mortgagee when he brings an action of this nature, would never suffer the mortgagor to turn the tenant out of possession. From year to year, is an estate which husbandry requires to have stability, and the law will not refuse it.

In great estates, who gives notice, the landlord or tenants?

I would not have it thought, if the tenants are ready to attorn, and leave their landlord, giving him notice to defend, that the mortgagor shall turn tenant out.

Tenant from year to year, every year is a new demise, and may be so pleaded.

Mr. Justice *Aston*—The serving the tenants with the declaration is the form only by which the mortgagee requires the rent against the mortgagor, who is his tenant at will, after the condition broken.

Mortgagee says, I come for title on the whole estate of the mortgagor, I shall not turn out the tenant; if I would, the court would not suffer me.

Lord *Mansfield*—It goes equally to paramount possession, and I think there would have been no difference if it had been a lease for years.

The mortgagee only makes use of the proper form: judgment will go against a nominal person, and tenant cannot be hurt, if he will do as he ought, not make any defence.

Curia omnis assensit absente—Mr. Justice *Willes*.

The King *against* George.

ON a special verdict, in which the question principally arising was, whether residents in a manor within an hundred owing suit and service to a leet within the hundred, but not comensurate or co-extensive with it, the limits of the hundred reaching beyond those of the leet, shall be obliged to serve as constables out of the leet, but within the hundred.

[366] Serjeant *Davy*—It was argued that there are two sorts of suits, suit-heriot and suit-service. Suit-heriot is on commorancy, and suit-service arises on reservation.

With respect to suit-heriot, it binds all except bishops, freeholders and women, and others particularly exempt by the statute of *Marlebridge*—and tenants in ancient demesne, though not exempt by the statute, but on account of the dignity of their service. *Shower*, 2 *Ventr.* 344.—It appears by the latter, tenants in ancient demesne may, notwithstanding, be made constables of the hundred.

Fitzherbert 161. folio edition. Tenants in an ancient demesne are not bound to do suit at the sheriff's leet; there is a writ which exempts them, but he does not say from being constables.

So women are exempt from doing suit; but a woman may by custom be obliged to be constable. [That is, I apprehend, by finding a substitute.] Vide *Wood's Inst.*

3 *Keble* 230. *King and King*. Question whether living within an inferior leet will exempt a man from being constable of an hundred? *Hale* said 'twas what the court leet could not meddle with, and the hundred extended beyond the leet.

11 *Mod. Regina and Jennings*. Court held defendant not excused, though an inhabitant of the town of *Farnham*, notwithstanding it appeared that no man of that town was ever known to execute the office of constable of the hundred; therefore it will not follow that if a man cannot be obliged to do suit in two leets, that he cannot be obliged to be constable, because he does suit.

Lord *Hale* says, he that owes suit to the leet, owes none to the hundred, but by custom he may do so; and here the custom is alledged and found upon the verdict.

On the other side by Serjeant *Burland*—Contended, that since leets were separated from the tourne, for the convenience

ence of the hundred, no person should be liable to do service at two leets, especially as when he had found pledges at one leet, all the purposes of the antient policy were answered. And so in *Coke's Commentaries on Magna Charta*, chap. 10. and on the Statute of *Marlebridge*. 'Tis carried so far, that if a man has houses in two leets, he shall be obliged only to do service where he is resident; nay, something farther, that if his house stands in two leets, he shall be obliged to do service only where his bed stands. *Hawkins Plac. Cor.*

The court leet is in no respect inferior to the jurisdiction of the hundred *pro visu franci plegii*, as the sheriff's tourne of the hundred was; and therefore that a person doing suit at the leet, cannot be liable to be chosen constable. [367]

Regular constables are to be chosen at the leet, and the jury who are resiants choose them; they are supposed to be chosen from among the resiants. They could not before the time of *Edw. 3.* which is the æra of the institution of justices, be chosen, unless present at the court leet, for they could not be chosen but in the court, and when the session of the court was dissolved, the steward's jurisdiction ceased.

If they were resiant, they were obliged to be present, or were amesnable to the jury; if present and refusing to be sworn, they were amesnable to the steward.

With respect to women, it cannot be applicable to the hundred of a custom to choose women as constables for the hundred; for women were exempted from attendance on the leet. And it has been already observed, a constable could not be chosen but from those who were present at the leet—and besides, if she could not find a deputy, and nobody shall be obliged to be a deputy, she could not be obliged to serve herself.

That tenants in antient demesne were under a particular exemption: but the non-liability contended for is not in the nature of a particular exemption, but more favourable.

'Tis a question, whether a constable is an officer by common law or by the Statute of *Winchester*? The more antient authorities are, that he came in by the statute.

Both these courts may be held at the same day and hour, and he cannot be attendant on both; and the law will not impose an impossibility as a general duty.

It is not stated that this is a subordinate leet; for where a leet has a particular jurisdiction, it may be otherwise, as appears by *Hale's Pleas of the Crown*.

It

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It is admitted too that it may be a custom that the reeve and a few resiants may attend, but in the same place. *Cro. Jac.* It is bad that all the resiants should attend.

[368] That it is not found that the manor of *Abbots Wooton* is within the jurisdiction; But this is not finding that it was ever part or parcel of the hundred. This is not found; if it were, what shall we say of a freehold which may be within the manor, but cannot be parcel of it.

That the case of *King and King* in *Freeman* and *Keble* is not very satisfactory authority. Lord *Hale* is made to speak unintelligibly, and also is made to contradict his own declared opinion in his Pleas of the Crown, where he says, "constables were by the Statute of *Winchester*."

That 'tis very extraordinary that no other book should contain these supposed opinions.

As to the case in 11 *Mod.* that from 7 to 11 *Mod.* is as bad authority as can be. That the reasons given in the 11 *Mod.* are so bad, that it cannot be supposed they came from the bench. What is the lord's having a right to sit as judge in the leet, to the jury's choosing a constable.

Replication Serjeant *Davy* in reply—I have found a great part of my argument answered as I expected, and shall therefore give the court very little trouble.

That a man cannot be liable to do suit at two courts at once; because a man cannot be obliged to be in two places at once, or do two incompatible offices at once, I admit, that the same faith need not be given to the public at two leets; this may be good as general argument, but there must be a particular custom shewn, which shall make leets as they were once generally, liable.

As to the incapacity of a man's being in two places, I shall be disposed to grant it; but what will follow? Not that he may plead a general exemption, but in case he be chosen in one court, he may specially plead this to exempt him from serving at the same time in another: but this will be only an exemption *pro ista vice*, and cease with the particular reason*.

My brother farther draws an inference, that because a man cannot do service in different court-leets, he cannot serve as constable. The juries say he cannot choose a man as constable, but who is either resident and at the leet, or obliged to be there.

Supposing

* *Cessante causa cessat effectus.*

Supposing he will not be sworn, what can be done? Not [369]
make him be sworn, but punish him for refusing to be
sworn equivalent to the amercement at a court leet.

My brother says, supposing there is a custom in general,
that resiants of a leet should serve within the leet, though
without the hundred, yet no such custom is found. 'Tis
only stated that there is an antient custom, that they do
serve. If a custom is duly found, I apprehend that they
do, is evidence they ought. But, says my brother, 'tis only
evidence of the fact. I have not sagacity enough to take the
distinction; the existence of a custom is evidence of a cus-
tom, as the existence of a thing is evidence of its being.

The objection is very curious, that saying the manor is
within the hundred, is no finding it to be parcel of the
hundred. How do they use the word in other places? The
resiants within a place are resiants of a place; the resiants
within the hundred, which they speak of before, are resi-
ants of the hundred. A manor within the hundred is par-
cel of the hundred by necessary presumption, and must be
so understood, unless the contrary be found.

Next my brother attacks my case on the authority of the
reporters names, and of the nonsense they make the judges
talk. As to the names of reporters, were they to speak
their own sentiments, and we were to judge from them and
their language, God help the judges! I wish reporters would
give us the judgment rather than the reasons. But if the
judgment in both reporters agree, the court will look to
the judgment and authority of the judges so agreeing. As
to the nonsense the judges are made to talk, that shall be
placed to the account of the reporters.

Mr. Justice *Aston*—It is set forth there is and hath been
an hundred from time immemorial, and that the manor is
within the hundred; this I must take as parcel of the hun-
dred; and it is farther set forth, that from antient time the
resiants were liable to do suit and service at the lord's leet—
and farther, that such as were chosen by the jury in the
leet have of antient time been used to serve the office of
constables within the hundred. And the defendant, be-
ing so chosen, refused to take the oath or serve the said
office.

Whether constables were by common law or by statute
is not of much consequence to the question. But by the
better and more modern opinion, they are by the common
law. As to swearing in constables, it appears by *Hawkins*,
if the party did not take the oath in the leet, before the jus-
tices

tices were empowered to swear him, he was amenable to the next court. I do not reckon women, and persons under particular incapacities, are within the nature of this question.

[370] As to tenants in antient demesne, I am informed from the case in *Shower and Ventris*, of the *King and Bellesworth*, that tenants in antient demesne were liable to serve as constables. As to particular inabilities, they would be excused when they arose; he wished this minuter question to be thrown out of the case, and wished the general question to be considered, whether residents of a court-leet within the hundred should be liable to serve as constables for the hundred, though not within the leet, but extending beyond it. In the absence of Lord *Mansfield*, he declined giving any opinion.

Quare ulterius de hac causa sed ut meminisse videor curia postea censuit contra defendentem et judicium fuit pro Rege.

Outlawry.

OUTLAWRY to be reversed on terms of payment of costs, appearance, and putting in bail.

Mic. 12 G. 2. Rule of court that defendant must enter into terms as above, of appearing and putting in bail to a new original.

2 *Str.* 1156. Case to the like effect.

The new original must agree in the nature of the action, and the sum in demand.

3 *Lev.* Where the outlawry is reversed, plaintiff must declare upon a new original, if in another county.

It was doubted, whether the words that he may declare should have an imperative construction, he shall declare.

Mr. Justice *Aston* seemed to think they were not imperative; and that a new original was only necessary where the party chose to declare in another court.

Rule of Practice.

A settled rule of the court not to enter into any special arguments, the last paper day of the term; because it would delay the motions till the next term.

[371]

Toll.

New Trial.

ACTION brought by Lord *Guinesborough* as lord of the manor of *G.* for non-payment of toll.

The

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The jury found for the plaintiff.

Motion for a new trial, on the ground that the consideration laid on some of the counts was not sufficient: and the verdict being general upon all the counts, no judgment could be had upon it, because the consideration in evidence was insufficient on some, and the jury had found upon the whole matter.

Per Curiam—To prove that the counts as laid in the declaration were insufficient, is no ground for a new trial: you must come in arrest of judgment.

If the jury find right upon the whole, on the mistake of not finding upon a right count, the court will be very averse to granting a new trial.

Rule to shew cause why judgment should not be arrested.

Indictment.

WHETHER good on 13 Geo. 1. c. 5. which provides that gatherers of ends of yarn shall be brought before a justice. Exception therefore was taken in arrest of judgment, that the offence was not an indictable offence.

To this Mr. *Buller* observed, that the 17 Geo. 2. had provided, that upon conviction the offender shall be deemed an incorrigible rogue: that the words duly convicted, can only mean on indictment.

On the other side it was denied that the second statute took away the mode of punishment by the first; because the object of that was to take into one all the different acts with respect to vagrants: and it recites the former statutes without any express words ordering any different mode of punishment: so that duly convicted must be understood in the manner provided by the original statute. Court were of the same opinion; and the judgment was thereon arrested, and recognizance discharged of course.

Return.

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SHERIFF'S return is not traversable—you can only have an action for a false return.

Appoint-

Appointment of Overseers.

TWO appointments being made the same day, and it not appearing which was first, the court on the case stated were immediately of opinion, that a third made the following day must be held good, and the foregoing void for uncertainty.

However, a rule to shew cause was granted, *vide infra*.

Outlawry.

AS to the matter of appearance abovementioned, it was afterwards mentioned in the court that by the statute 4 & 5 W. & M. no person who shall be outlawed for any cause, matter, or thing, treason or felony excepted, shall be compelled to appear in person to reverse the outlawry, nor to put in special bail; except in cases where special bail is required, *Salk.* 296. *Vide* 2 *Str.* 1178. *Senecold and Hampson*.

Rule where Judgment goes by Default.

YOU can't deny the substantial charge, where judgment goes by default, but you may go to extenuation very properly by evidence.

Composition on a Penal Act.

MOTION for leave to compound on the building act by consent of the plaintiff—the court would not grant the rule as of course, for that it might be covin or collusion.

Court directed that as soon as the buildings were finished agreeable to the statute, and the mispleadings corrected, the motion might be made—in the meanwhile proceedings to be staid.

Costs

7 *James* 1.

IN all causes where justices of peace, constables, &c. do any thing in execution of their office, they may plead the general issue; and if verdict for defendant, or judgment by nonsuit, liberty to tax the double costs.

At this ~~Thompson~~, a Mr. Cowper begins his Report,
& his superior merit as a Reporter renders it
unnecessary to read the remainder of this Volume, which
is useful only so far as it serves to fill up a chasm in
the history of decisions from the time of Burrow to that
of Cowper -
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Hilary Term,

14 Geo. 3. 1774. K. B.

Lee against Ganfell.

ON a motion to shew cause why the defendant should not be discharged out of the custody of the marshal.

The ground insisted on to maintain the motion was, that Major General Ganfell, the defendant, was illegally arrested, and the arrest thereof null and void, and that he ought to be discharged from the consequences of the arrest.

Case, that the defendant having lodgings to his separate use, and the door thereof being shut, the same was broken open, contrary to law, in order to arrest him. The arrest thereon bad.

The case was stated thus, in answer to this suggestion :

Major General *Ganfell* had lived for several years in lodgings, taken by the year of Mr. *Mayo*; which lodgings had one common entry into the street, by the house door.

[375] The plaintiff, in prosecution of a debt, with a due warrant, and the assistance of divers persons, entered, by the OUTER DOOR being OPEN, and being in thus, they asked for the General; but were refused, and obstructed by force: And going up stairs to his apartment, found him upon the stair-

Note, This case had been before in the Common Pleas, on the fourteenth of September 1773. And I have seen a printed account of the case, which says, that it was tried by Mr. Justice *Nares*, on three several indictments, preferred against Major General *Ganfell*, "for maliciously and feloniously shooting at *John H.*, bailiff, and others," named in the indictment. And then, as to the point of law, Mr. Justice *Nares* had expressed himself of opinion, that the defence of General *Ganfell*, that his house was his castle, was *incontestably sound doctrine*.

The jury found him not guilty.

stair-case, and were endeavouring to follow him in, and that *Hyde* the bailiff, shewed him the warrant; and, on his getting away from them, as he was just entered in at the door, and before he could shut it to, got his knee in, and a pistol was fired at him through the door, thus partly open, by the general; that they rushed in, and endeavoured to secure him, and he fired another pistol. That at last, however, they arrested him, by force, in consequence of his resistance, and for their own security. And thus that the arrest was good.

The evidence on affidavits was much the same as on the trial in the Common Pleas.

The point first relied on in answer was, that the arrest was good, because the door of the lodgings was not broke open; but the sheriff's officer had first made a lawful entrance, by pushing in a part of his leg; and if he was afterwards turned out, he might well force the door, to execute the process.

The evidence was entered into to prove this part of the case.

But if this fact was doubted, then they contended, upon the point of law, that if an outer door was open, an inner door might be broke, and the arrest legal.

In *Hale's Pleas of the Crown* it has not been stated whether the owner inhabited.

That there was a case of chambers in a college, and if *A.* lets a chamber, and the door be broke open, you may have an indictment, *quare domum mansionalem fregit*; but this, *ex necessitate rei*, lest justice should fail. And the lodging is not the mansion-house of the party, to defend him from arrest on civil process, though it may be to secure his property and person from robbers, and enable him to prosecute criminally against a wrong doer; since the owner of the house, who was not robbed, could not prosecute for the robbery; and it is necessary some body should.

Keeling, 83, takes a distinction where there is but one common entrance, and where there are divided houses; for if there be separate possession, this shall of itself only put the occupant in the state of a lodger.

Old Bailey, *Michaelmas* term, Lord Chief Justice *Holt*; where inmates have separate rooms, and keep stair-cases separately, yet have entry by one door with the owner, the indictment must be *quare domum mansionalem fregit*, of the [376] owner; and they are not *domus mansionalis*, of the inmates. An old clerk said, the practice had been according to *Keeling's*

ing's book, on which Justice *Holt* said he grounded his judgment. These apartments were taken by the year, on certain rent.

Case 13 of his present majesty, *A.* tried for burglary, in breaking open the mansion-house of *Chandler*, who was an inmate, and had taken a parlour and shop in the dwelling-house of the owner. Though the house was divided into several apartments, and the owner inhabits in one of them, yet this was contended to be the mansion-house of the owner.

All the judges, on conference, held, that the indictment was well laid: For as the owner inhabits one part, there would be no remedy in such an instance, which happens frequently in *London*; but expressly otherwise if the owner had inhabited any part.

Farther, it was argued, in the third place, as a very important question, whether the arrest be illegal, even taking this to have been the mansion-house of General *Ganfell*.

The sheriff is to take defendant, if within his bailiwick, *Br. Trespass*, 390, where *Littleton* and the rest hold, that the sheriff, on a *feri facias*, is not warranted to break the house, and shall be liable for trespass: But the taking of the goods shall be excused; and accordingly *Dalton*. So that, though they are liable to trespass, if the arrest be illegal, in doing what exceeds their authority, yet what is done by authority shall be good.

Conviction
does not
hinder evi-
dence till a
man be at-
tainted by
Judgment.

Objection to reading of *Lee's* evidence, as convicted of perjury. It was held by Lord *Mansfield*, that conviction was not sufficient, unless judgment thereupon. Lord *Mansfield* said, he thought there did not exist a case in law, where a conviction could be read before judgment. A man may move in arrest of judgment.

Mr. *Morgan* mentioned a case, in which he said, the conviction was admitted without judgment. They pleaded against a woman as *feme sole*; she pleaded her coverture: and the conviction was admitted of her husband, for transportation, in order to bar the plea of coverture. And the said plea was accordingly adjudged insufficient.

Lord *Mansfield*—This was evidence in a civil action, to make the *feme* liable: It went to prove there had been a transportation, but you could not have brought it to have proved a crime.

Mr. Justice *Aston* observed, that the conviction and order was made by a special act sufficient evidence. To which
Lord

Lord *Mansfield* farther added, the judge made a regular judgment in felonies for transportation; and as civil evidence you may read a verdict, but not where a disability is to be introduced on the crime of the party. [377]

On the other side, in support of the motion on the case, as stated upon the evidence on their part, it was argued to the following effect :

That with respect to *domus mansionalis*, the law had spoken with particular regard to the liberty and security of men in their houses. But that in all the cases cited, it appears it would have been burglary to have broke open the apartment or lodging house, to have robbed General *Gunsell*. And not one case, in which the sheriff can break open the door to arrest, where to rob it would have been burglary, in the same circumstances. A chamber in a college would have been protected; and in that instance they may be said to have all one door. There is no doubt it would have gained a settlement.

As to the right of keeping and detaining on the arrest, in the case cited from *Brooke* and *Dalton*, there is a case in *Atkins*, 138, where a petitioning creditor, who could not arrest, got the debtor where he could be arrested, and then got his own debt; and from the person who might have arrested, the benefit of the arrest was taken away, and the bail discharged by Lord *Hardwicke*, because the petitioning creditor, through whom he came to the opportunity, had not the right of arrest.

It has been much relied, that though an action would lie, yet the arrest should be good, to keep the General in custody. Now wherever a privileged person, in consequence of his attendance on a court of justice, is arrested, it does not end by subjecting the person arresting to an action: But the party so arrested shall be discharged. And here, that if the arrest was unwarrantably made, the court will not permit the parties to take advantage of their own wrong. [*Nemo lucrabitur de injuria sua propria.*]

Mr. *Dunning* observed, that he was glad to find Mr. *Wallace*, and the other gentlemen, insisted so much on endeavouring to deny the fact, as stated by the general, because he thence took the liberty to infer, that they did not rely, so positively as might appear in words, on the point of law.

Observation on the evidence.

What may be the conduct of the General is another point; though by the proper judge, and by the proper trial,

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That the door of his apartment is to a lodger as the outer door to the inhabitant.

trial, he stands acquitted of the crime; at least as imputed to his charge. But whatever be his conduct, his birth-right here is a law and liberty which he is entitled to whenever he demands it. Let us observe what is the case. If a sole individual be the occupant, in that case the keeping shut his outer door may be presumed a sufficient defence, it is competent to him to shut it: To a person who inhabits by a demise under him, in a part of the house, this is not competent; the door then of his apartment is to him the door of his house, as being the only one which to him can answer the purposes which the outer door does to the owner.

Domus sua cui que castellum.

Every man's house fortified by the law.

That therefore materials, strength, apartments, inner or outer door, make no difference.

Though it is not always of necessity, nor perhaps here, to go upon the original foundation of a right of law, yet I will beg leave to observe, when we apply the maxim, that every man's house is his castle, we mean not to persuade the inhabitant of a poor hut, that it is provided with draw-bridges or portcullises, but only that it is under such sufficient protection as may provide for his security in a more pleasant, or perhaps, a better way—that it is FORTIFIED BY THE LAW. * Lord Hale has been cited: but I did not imagine that it would have been contended that Lord Hale had been so inaccurate as to have forgot, in stating a case, the very ground on which it is to be understood to have went. It appears to me, whatever privileges an house of stone gives from arrests, the same legal protection is given me by a house of mud. And whether the apartments be more or less, I don't see the difference of reason, and cannot, therefore, see the difference of law. The less the number of apartments, the less garrison they will require: and I don't see why what should only be supposed to make it more tenable, should increase the danger.

That it would be strange if two outer doors should protect owner and lodger, but one the owner only.

As to the word inmates, I don't see it is used in an opprobrious sense, as next to vagabonds, but it may apply for the purpose, if the owner had no sufficient nor settled apartment, but might be obliged to go from room to room as the convenience of the family required. It would make an odd doctrine in our criminal cases, if two outer doors should be understood to protect owner and lodger; but one door the owner only. The case in burglary is certainly held, that if a shop hired of *B.* by *A.* and *A.* does not lay in it, no burglary can be committed; because it is not the dwelling-

* Similem habemus Demosthenis præstantissimum & notissimum locum, οὐ γὰρ ληθὺς ὅδε πλὴν τις ἐσεύχετο τὴν πόλιν.

dwelling-house of the owner who has let it, nor of lodger, because he did not dwell there: and may it not appear to introduce some absurdity, that the same law should be where the lodger does dwell? On that ground it appears to me that neither owner nor lessee could maintain an indictment of burglary. And in this case too the door of the apartment is the only defence of General *Ganfell*, not against the ministers of justice only, but the professed violators of it. As to the case stated as lately before this court, what was the decision makes not against me: and what might pass after was conversation, and not decision.

*I go on to the point rested on so strongly, that the officers shall be liable for a trespass; but the arrest good. If a trespass be all we are entitled to recover, our satisfaction for the breach of domestic security will not be worth much. The privilege spoken of in persons going to the court, is the privilege of the court, rather than of the persons. And farther, on the general rule obtaining, I apprehend whenever an injustice is done, the justice is to undo it: otherwise it would be encouraging much violation of justice in the persons themselves and others. And then without any particular authority, the name of *J. S.* or any body else, he compasses his debt of 200*l.* by a violation of the law—at the expence of 10*l.* I recover 190*l.* He will, perhaps, not have always the most profound reverence for the law, to such a degree, as in balance of the account, not to find himself disposed to the violation. As to pecuniary recompence, it applies but very ill to satisfy for the loss of liberty: for the specific injury nothing but a specific remedy is desired, and the restoration of liberty can be the only compensation for the loss of it.

That if a lodger may not defend the door of his own apartment, he has no security. That trespass is an inadequate compensation. That 'tis not like privilege of going to the court. That justice consists in undoing injustice. That it would encourage injustice. That on such a balance of account, a bad man would be much more likely to break the law, than to fear it.

Libertas non recipit æstimationem.

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Mr. *Cox* desired to observe, that the lodgers and inmates are, upon a computation, understood to be about seven-tenths of the inhabitants of the city. That an idea he found had been among them, however wretched they might otherwise be, they might each protect securely his person and family under his own lock and key. If this only claim of happiness be taken from them, from henceforth they must not be safe in their beds.

Mr. *Cox.*

Number of lodgers.

An oppressive creditor may drag him out of his bed, throw him into prison, and complete his wretchedness.

A duro et inconvenienti.

Mr. *Murphy* observed on the circumstances which appeared contradictory in the evidence against General *Ganfell*.

Mr. *Murphy.*

On the evidence as contradictory.

On the authority as not against the case, but rather for it.

The case of Lord *Hales* is not the only one, *Cro. Jac.* fo. 65. and *Hawkins's* Pleas of the Crown, both agree that indictments of burglary will lay, and several chambers shall be the *domus mansionales*. Therefore, says *Hale*, wherever there are servants who have no several occupancy, it shall be the *domus mansionales*; also chambers in the inns of court are always taken as separate houses. And let me ask whether, if General *Gansell* had been possessed of a most valuable collection of pictures, and Mr. *Lee* had taken offence and broke into those chambers, should not the indictment have been laid against him for breaking the mansion-house of General *Gansell*.

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Party discharged, where arrest illegal.

Mr. Morgan on the evidence.

Another case was that of the King and *Bresser*. The case was a travelling Jew had been robbed at a public house: it had been supposed that the publican had assisted and therefore, *propter necessitatem*, the indictment was to be laid as for breaking open the house of an inmate or lodger. The publican was afterwards acquitted, and therefore the indictment could not be supported for defect of form, as it should have been (unless *propter necessitatem*) for breaking the mansion-house of the owner. A case cited before Sir *Tho. Clarke*—when the party was imprisoned, and discharged, the arrest having been illegally made.

Mr. *Morgan*, upon the evidence as improbable—and that the door might have been broke, and afterwards locked by driving in the screws; that with respect to the point of law, where the arrest had been illegal, the court would not endure the holding over upon such an arrest.

Inmates.

Argumentum a simili.

Mr. *Murphy* defined inmates as occasional occupants only, or inhabitants at will.

Mr. *Dunning* observed, that colleges were anciently called houses; and yet every chamber deemed a separate house.

The case stood over—

Afterwards 26 *Jan.* in the same term, the Lord Chief Justice delivered the opinion of the court.

GENTLEMEN,

This is a motion on the part of General *Gansell* to be discharged out of custody; on the ground of an illegal arrest; “for that the officer broke open his door, which by law he could not; and that the arrest having been in an illegal mode, the law ought to discharge him, and put him in the same condition as before.”

There are three defences, I think, made:

1. That

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1. That the door was open; and that the officer having his thigh in, defended his entry.

2. That they had a right to break open the door, in execution of civil process—no ground is taken that there was not sufficient notice.

3. That the arrest was legal, for they were to take him wherever they could find him; and the only illegal thing was, the breaking open the door, for which there lay an action of trespass, or in the more summary mode of proceeding, an attachment against the officers.

As to the first, there is great contrariety of evidence; [381] and what would be the consequence in law, of the door being partly open, if the person within, struggling to keep out the officer, shut it, I shall not examine, as I am by no means clear of the fact, as to its circumstances: And as I think it may be entirely thrown out of the question.

The second, whether this door may be broke open in execution of mesne process?—I will state the case; and, speaking from memory, you will correct me if I mistake—I speak for the sake of the students and those who attend.—The fact is, Mr. *Mayo* was owner of this house in which Mr. *Ganfell* had a right to two rooms on the first floor, opening to the stair-case; and two on the next, opening also to the stair-case; with the use of the kitchen and of a garret. It is farther stated, Mr. *Ganfell* is tenant for years—though that makes no difference—and, which is the material thing, that there was but one door at which both came in. Mr. *Ganfell* was up stairs; they went up, giving notice, and broke the door open—nothing turns upon the notice, or manner of breaking. I should state that they entered legally at the outer door, being open.

The question is, whether the door of the apartment can be lawfully broke open?—Now by the law, the house and door have a privilege annexed: I forbear giving any particular epithet at present, to the door thus privileged. But let us consider what this privilege is; which is not the privilege given by the law to the man, properly speaking, who absconds from his creditors, and evades the process of the law, but arises from a maxim of sound policy, whereby a lesser evil is suffered to avoid a greater, and for the security of a greater good, a less is supereded.—The outer shall not be broke open—this is the man's castle. The idea took rise in times of greater violence, in that respect, at least, than the present: when protection of the outer door was very necessary to the inhabitants, not only from thefts, but

This seems
a kind of
remitter of
the act done
to the better
right by
which it
might
now be
done.

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from open violence of various kinds. But this maxim, thus taken, will not admit of any equitable extension or beneficial enlargement. Accordingly, in the oldest case, 18 *Ed.* 4. which gave rise to the privilege at all, on the *fieri facias* they entred, and broke in at the outer door, and they decided that they shall not break the door; and for that trespass lies: But they broke a trunk in which were the goods; the taking of the goods was lawful. *Semain's case*, 5 *Co.* in the reign of *Eliz.* the breaking open was trespass; but the taking of the goods, though the opportunity was gained by trespass, lawful. I don't say that I should be disposed to decide exactly in the same manner, in a case the same before me, but to shew from the earliest times downwards with what strictness this principle has always been understood; and in *Yelverton* you find, *Popham* doubted whether the outer door was privileged; and it was rested upon the single case of *Edward*. But as to the outer door, the law is now clearly taken, and the privilege fully understood.

I don't believe there has been a single dictum, or it would have been cited, mentioning the protection of an inner door. In *Hobart* 62, *Hobart* 263. they had come legally in at the outer door; they broke the inner, and committed many great misdemeanors: They were punished for the misdemeanors; but the entry into the lodger's apartment, (they having once come in legally at the outer door) was held good. And yet one of these was a very harsh case, for they broke in where the man and his wife were in bed; and behaved with great violence and outrage; but I lay stress on this to shew how strictly this maxim has always been taken—when the outer door or window is secure, and the entry has been lawful and peaceable by them, and when the due notification and demand has been made and refused (to justify proceeding to such extremities) the family are then in safety, and in their accustomed protection against all insult and injury and wrong-doers from without. And very lately the case has been very solemnly determined in the year 1762, *Astin and Pindar*; that was a case upon trespass; all the other points were answered, except the breaking of the inner door, and it fell in with such violence, that the officer fell in with it: and it was determined by all the court, that the breaking the inner door was lawful, after the entry by the outer.

Agreeably to these principles, and these decisions, I shall cite a very sensible distinction from a book in my hand, to the point in question.

Foster, tit. *Hom. c.* 8. § 20. "The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant; and perhaps farther than the scale of reason and sound policy this will warrant. In the case of life, as we have before hinted generally,—but in the case of life more particularly,—this privilege, and the maxim which supports it, will admit of no extension. It must be confined to breaking the outer door, or window, for the protection of the family, and security from without; and it belongs to those whose domicile it is; for it is not the sanctuary of a stranger. And when a man escapes from the arrest, he is not privileged by his house."

The question now is come to this—"Whether this be an house? Every house certainly must have an outer door.—It has been said, that chambers in Colleges are houses, and chambers in the Inns of court, and burglary will lie. Why they have every one of them an outer door, which protects them from without; they have several occupants, and no others dwelling in them. In *Lincoln's-Inn* they may have [383] estates of inheritance; in the others they may have estates for life; and in colleges, as long as they reside there. And in the case which has been mentioned of *Newcastle-House*, they may have separate fee.—They have two outer doors.—When the owner of the house has nothing to do with it, but a cellar or stable, there burglary must be laid in the house of the lodger;—but if otherwise, and there are lodgers in the house, who have not an outer door, there burglary must be laid in the house of the owner.

With respect to the opinion of Lord *Hale*, great as the authority is, perhaps it is not clearly expressed; or was not fully reported, according to his meaning; or might not be sufficiently considered. At all events, we cannot decide upon a single and uncertain determination, against so many clear and positive decisions, against the oldest cases, confirmed and recognized by the most modern, and against the most established principles of the law.

If there were nothing else against the proposition, which it has exhausted so much learning and ingenuity to support, it might be confuted from the absurdity; for whereas the largest house in *London* is protected by but one door, General *Ganfell* had four doors,—four houses, within one, to protect him: And there had been greater pretence, if it had been on the first stair-case, which was the first door of his they had come at.

With

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With respect to relief, it is not material to speak ; the behaviour of the party might induce the court to refuse relief, in a summary way : 'Tho' when a person is arrested in attending the process, the court has interposed, not only by punishing the officer, but by discharging the prisoner out of custody—but this would greatly turn on the discretion of the court ; and this is not a case of that nature.

We are therefore all of opinion that General *Ganfell* ought not to be discharged.

Gaming.

Jones against Randall.

23 April 1774. K. B.

23 April,
1774, K. B.

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DECLARATION that there was a promissory note on a wager given to the plaintiff by defendant in case of a decree in the court of Chancery should be reversed in the House of Lords, to which decree the person who had laid upon the reversal was party, and had set off his loss by the reversal, upon which the decision would be against him by his gain upon the wager if it should be reversed. They gave in evidence a copy of a minute-book of the House of Lords.

Verdict for the plaintiff—upon which motion for a new trial, because evidence insufficient. Lord *Mansfield* being against them upon that point, there was another—that the contract was illegal : So that the points in this case were two.

1. That the evidence was insufficient, which went to the new trial.

2. That the contract was illegal which went to the motion in arrest of judgment.

Mr. *Wallace*—That the contract was neither dangerous nor immoral, nor yet illegal, because no positive law against it, and because a fair wager.

Mr. *Mansfield* upon the same grounds—and that if wagers of indecorum were not only not to be encouraged, but even must be disallowed as illegal, then a wager upon the life of a father and of an aunt against a grandmother bad—alluding to a case.

And that there will be less danger of unfair and immoral contracts, because the advocates cannot be bought off ; and much less the Lords. That it would be less dangerous than

than any other; because few gamesters held any subject so little interesting, and had none they knew less about.

As to the contempt of the court, how does that appear? It may naturally happen that both parties, supposing the court will decide right, dispute as long as reason and argument will hold out, and then come to the dernier resort, a wager; and if it be a contempt to suppose it uncertain, which way a court of law or equity may decide, how happens what we observe daily? How few lawyers will venture to pronounce a point of law certain; and if one of the counsel, having looked in his note-book, might say, 'tis very clear for you; another—I think, Sir, the weight of authorities makes against you—and a third, I wish you success, but indeed 'tis doubtful—what should a man do, a great part of his fortune depending upon the event? What would a prudent man say, but lay the wager in order to be safe at all events. The knowledge, or more truly the ignorance, of both parties in this case was equal; and the stakes equal.

Mr. *Dunning*—That whatever would be law to Mr. [385] *Jones*, would be law to any other person of whatever profession or knowledge. That the contempt was evident, admitting the proposition that the laws of this country were certain; that the judges knew them, and would decide accordingly. That to make the wager fair, the laws must be supposed uncertain; and the judges so ignorant as not to know, or, knowing, so wicked as not to decide accordingly; and though the learned gentleman abstained in words from comparing it with a lottery, yet he must in idea to justify his motion.

The case of Lord *Marchmont* was only upon the different abilities of counsel; and upon a question of Fact unknown to either party; and for all I know equally probable, where Mr. *Pigot* or *Cuddington* was then alive. That to lay a wager of the sort of this, now before the court, was as if a man were to lay a wager upon the truth of a mathematical proposition with which he was well acquainted. I hope your Lordships will shew that determinations of law are certain; and too serious to be treated like matters of the least and most despicable regard, things of mere chance.

Lord *Mansfield*—This case must be taken upon the count in the declaration; and in declaration it is stated as a wager. The appeal depending, and the person who made the wager a party, if he won, the money was to pay the loss of the Suit; and if he lost, he was to receive the very same sum

sum out of what he recovered in the event of the appeal. There is no inequality, therefore; now the question is, whether this Wager on such circumstances shall be maintained?

There is no positive Law: Many things are bad by that, which otherwise were not. There is no positive Law, nor any Case in the books; but Mr. *Dunning* argues rightly, and I think very conclusively, that if it is bad upon principle this is sufficient. The Law would be a strange Science if it rested solely upon Cases; and if after so large an increase of Commerce, Arts and Circumstances accruing, we must go to the time of *Rich. 1.* to find a Case, and see what is Law. Precedent indeed may serve to fix Principles, which for Certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be Evidence of law, is not Law in itself; much less the Whole of the Law.

Vide the
case in Burr.

Whatever is contrary, *bonos mores est decorum*, the Principles of our Law prohibit, and the King's court, as the general Censor and Guardian of the public Manners, is bound to restrain and punish. Now here is a Wager only to secure the precise Sum which defendant would be to pay. Both parties of equal knowledge or equal ignorance. *

[386]

If indeed any thing had come out upon the case, though appearing under Colour of a Wager, to cover a Corrupt Agreement, then the court upon that coming out would certainly have Defeated such a purpose.

It is stated in *Puffendorf* and *Grotius*, I think, amongst evasions to simony—speaking to a person, I will bet 10,000*l.* I don't get the bishop—rick: this was evident Corruption.

* Which is
champerty.

If this had been a bet with one of the Lords, this was a bribe. If it had come out upon the case that it was a corrupt Agreement, in order to get usury upon money lent by the event; or to receive part of the thing in debate; * this the Law would disallow. It might have been very bad had it been between Party and Attorney or Advocate.

Here it was only a man's Insuring something at all events. If there were several policies, it might be a large sum, and the event might be the loss of a man's whole fortune, upon which he might have a reasonable desire to secure something.

It

* Par scientia pares contrahentes facit.

It is argued upon the doctrine of Predestination that the event is certain; (that is, Certain when it shall happen :) but in Truth, the person who laid the wager, laid with the presumption of the case against him, as a Decree of the court of Chancery had been on their side, which the presumption, in some measure was, would not be reversed. But the law is certain—it were very unhappy, gentlemen, for you, if it were certain to every man, before the decision. But this Certainty is so Uncertain, that it requires a great deal of money to come at the Last opinion of what is law. As to Lord *Holt's* case, [which Mr. *Dunning* had apologized to his Lordship for alluding to] I know not whether there ever was such an one; but there might be circumstances of Inducement, which might warrant his declaration. I remember Dr. Sherlock said, on mentioning what ecclesiastical Judges they had, that a Surrogate had pronounced upon a point—a Barber by said, I will wager a crown that is not Law; the Surrogate took the Bet, and went to a Doctor of Law to ask his opinion.

I think, if any kind of betting was to be tolerated, it would be this in the case before us now, in order to oblige gentlemen to study so hard, that they would venture their money their opinions were right: And it is a wager not likely to be very frequent. Is it then against good Policy? It is no more than on a fair Bet, an endeavour to secure something, let the event fall as it will; in a matter where men of great parts and learning might have very different opinions, and the result impossible to be foreseen by men in the situation of the parties, before the event. Nor do I [387] see a disrespect, either relying so strongly on each side, that their own opinion was Law.

There is on the whole, I say, nothing against good morals or policy to affect the Contract, or induce us to declare the Plaintiff shall not recover.

All the rest of the Judges of the same opinion—absent *Asbhurst*.

Lord *Mansfield* observed farther, that if there ever was a suit to authorize a wager, this was one. His Lordship said, when he went down, and saw the reasons of the case, he only considered what costs. But Mr. Solicitor-general, in opening, went upon the case of *Perryn* and *Blake*, express limitation, and afterwards very strong words.

You will follow my ideas immediately (said his Lordship.) I asked him, “Mr. Solicitor, you don't mean to argue upon “this? It is not in the reasons.” “No; but they have altered

altered their grounds." However, I desired the case might be confined to the reasons stated in the printed case: And upon them the decree was affirmed.

Note, This is a very special case, and seems not intended as a precedent, except where there shall be almost an identical parity of circumstances. The exact equality, and it being between parties in the suit, and to balance in part the loss or gain on the event, appear the principal grounds.

As to the point of evidence, and objection that only a copy was read, and only the petition and decree, whereas they insisted, the original should have been produced in evidence, and the previous proceedings, as bill and answer, and decree in Chancery read, as in a verdict, which, they insisted, could not be read in evidence, unless the declaration and plea were read, and so of the rest of the intermediate process.—

Lord *Mansfield* said, I remember Mr. *Onslow*, in the case of Sir *Watkins Wynne*, insisted on the copy being read of the HOUSE OF COMMONS, and though I had the original papers by me, [as counsel] I did not dare read them, as Mr. *Onslow* insisted on the point of dignity of the House. But what defeated Mr. *Onslow's* objection of dignity was, that the HOUSE OF LORDS is a COURT OF RECORD, but the HOUSE OF COMMONS not.

And I remember a case of law to this point, which I learned very early the first year, upon the northern circuit. I was not in the cause, but was one of the by-standers. There was occasion to read the minutes of the HOUSE OF LORDS in the case of Lord *Derwentwater*. Sir *Thomas* [388] *Boyle* insisted, the minutes could not be read, because they were not on stamps, and he succeeded. But, as soon as it was over, he whispered me, "It is very well; but stamps were not necessary."

On my return I enquired in town, and found that all the Judges of England were agreed, that the Minutes of the House of Lords were not within the act of Queen *Anne*.

RULE DISCHARGED.

Lodge against Perthouse.

Award.

ON a rule to shew cause why an attainment should not issue for non-performance of an award.

In

Hilary Term, 14 Geo. 3. K. B.

In answer to the rule, it was alledged, first, that material witnesses were not heard on the side of the party complained against, within the time prefixed for making the award.

Secondly, that the award was executed, or appeared to be executed before the day; and after by erasures, the day, &c. was altered to make it appear to have been executed on the day.

Lord *Mansfield*—Does the party say in what the witnesses were material?

Contended, that when witnesses were unsworn, they were not under the presumption of being immaterial, if they had been examined, when the request was made in time. And that even farther, the arbitrators themselves had promised to hear them. And that they had not answered by denying the refusal.

Lord *Mansfield* observed, that if the party had been advised by any counsel who was a friend, he would have desired to refer. The defendant had paid 3l. 7s. 6d. into court; so far was payment. The only question was, whether plaintiff was entitled or no. There was besides two guineas and an half, for rent, demanded; something for wood, about two shillings; and another demand of furniture for stalls.

There is a contrary demand of a right to passage.

If he the plaintiff did not recover more than had been paid into court, he was liable to costs.

The rent was a false demand: It was putting them unjustly [389] upon proving payment; which they did by producing the receipt.

As to the second, it was admitted by the defendant.

As to the third, the arbitrators, from their own acknowledgment, compromised it, by cutting off one fourth.

What then was there to be proved?

After one hearing, however, plaintiff alledged he had a material witness. One of the arbitrators excused himself from hearing him, as not being at leisure at the time desired; but that the other would hear it.

Accordingly one witness only appeared, and proved only what the defendant had admitted.

The plaintiff desired to produce farther evidence.

And does it appear, in so short a time as between the first and fifth of November, this conduct was driving off the matter, with a view that the time might be expired?

The

The arbitrators postponed making their award, and offered to hear the plaintiff's farther evidence on the 25th of November, and gave notice that on the 28th they should make their award.

Between the first and fifth of November can he complain of want of notice? Attorney for the defendant is met by the plaintiff's agent, on the road; and agent of the plaintiff is told of the time appointed—to which the answer was, that Mr. *Lodge* was not able to have his witnesses, or to be present himself then; but that he should be at least any time between the first and fifth of November. He has five days previous notice. He was an attorney, as appears by the affidavits, resident upon the place; nor does he shew why he could not have his witness then.

This behaviour is driving them about, and putting them to the expence of this circuit, after all the costs of the arbitration. The sum demanded, so far as is proved due, is a little short of what was paid into court: The alteration of the date proceeds from his own request of farther time.

Therefore, let the Rule to shew cause why the award should not be set aside, be discharged with costs;

And the Rule of Attachment be made absolute.

[390]

Mandamus.

To a Steward of a Copyhold Court to admit.

MOTION for a *mandamus* to a steward of a manor to admit.

The steward, in answering to the rule, stated, that the person claiming to be admitted claimed under a will, with other devisees; and that the claim of those devisees had been found void, by reason of insanity in the testator.

To this the party applying for the *mandamus* replied, that by the finding of void devises, as to the other devises, it did not appear that the title of the devisee now claiming was affected; for that the devisees claimed under codicils, at the time of which the testator might be insane; but not therefore of course at the time of making his will.

Mr. *Bearcroft* said farther, that this was a case between a customary heir and a devisee: That a customary heir might try his title without admittance; but no other person could.

Lord

Lord *Mansfield*—The devisee will shew his devise ; which will be sufficient to protect him against being turned out by the heir.

But there is cause enough, from what has appeared of the refusal of the steward to admit, to grant a *mandamus*. This refusal cannot be for any good reason: The admittance is no title by itself; nor would prejudice any adverse title; * the steward would have a fee the more. And his standing in the relation of father to the heir at law, besides adjourning the court to avoid admitting, increases the suspicion.

Rule absolute for a *Mandamus*.

Arrest.

IF a bailiff hath made a legal arrest in a street, and the prisoner escapes, bailiff may justify, on a fresh pursuit, breaking open the door of the house, to retake the prisoner.

The tenant is in by admittance only according to the quality of his estate in his true right: and the lord, thro' his steward, is only an instrument of custom to convey that right. V. Coke's Complete Copyholder

New Trial.

[391]

ON a motion for a new trial, on a ground suggested of the jury finding expressly against evidence.

This was on an action of trespass. The trespass declared on was breaking into the plaintiff's shop, when his goods were upon auction, damaging his goods, and obstructing the sale. No damages proved. Lord *Mansfield* said he left it to the jury, upon the damages on the trial. They found for the defendant: He declared himself not dissatisfied; and said, he thought they ought to waive their motion; for if they went to it again, they might probably recover sixpence, which would be all they could deserve.

Vide Bur. Farewell and Chaffey, p. 54.

Arbitration.

Costs.

COSTS of arbitration to abide the event. The meaning of this is, that the party who prevails with the arbitrator shall be in the same situation, as to costs, as he would have been on a verdict. If on losing the cause he would not have been subject to the costs of the cause on a verdict, neither is he on an arbitration; for in that case something

Costs of arbitration to abide the event means such costs as might have been lost or gained upon verdict.

* Quicquid in custodia legis est invita lege evadere non potest.

something special must be inserted on the order, without which he cannot be liable to other costs (upon the general direction of costs to abide the event) than he would have been on a verdict.

And it is always drawn so, unless there be special directions to the contrary.

The expression means the costs of the cause to abide the event in such manner as they would have done on verdict. Therefore executors are not liable under such general words other than they would have been upon a verdict.

New Trial.

Rex *versus* Greg.

Indictment.

ON an action tried at the *Middlesex* assizes, before Mr. Justice *Aston*, on two counts.

[392] One for driving a dray in such manner, that casually and by misfortune, the horses being carelessly driven, the off wheel ran over one *E. A.* an infant of two years old, and killed her on the spot.

The second count was, for carelessly and negligently driving the horses; by which carelessness and negligence, many of the king's subjects were frightened and greatly endangered.

The jury found against the defendant, on both counts.

Mr. *Dunning* objected, that on this driving, and the accident casually, and by misfortune, and so stated in the indictment, no offence is stated.

But that particularly on the second count he meant to take his exception, as that whereon no offence could be pretended to be charged; though, he said, he was very ready to meet them on the first.

Court asked, whether there had been any coroner's inquisition on the body; which it appeared there had not—much to the dissatisfaction of the court.

Rule to shew cause.

Note, The first count seems to charge, very clearly, an offence amounting to manslaughter, a negligent carelessly driving in a public street in London, whereby an infant, unable to get out of the way, was killed. And the reasons and authorities seem to be clear, that such a driving

Vide *1*
Hale, c. 39.
p. 476. ex-
presses to this
point.

a driving through a crowd would have been murder, without any express or particular malice proved.

Accidentally and casually, by itself, charges no crime at all; it is only *homicide per infortunium*; yet the thing which caused the death is a deodand. But negligence and carelessness is a crime, and at least manslaughter when it produces death of an human creature; nay, very wilful and obstinate negligence, as driving through a crowd, or shooting at random through a crowd, though under excuse of shooting at a mark beyond, will be murder. So throwing tiles, or the like, off an house, without giving notice, in a street where many people are passing, if any one be killed, it is held it will be murder.

And any killing, not justified by necessity, or the command of law, nor purely accidental and involuntary, not depending on the care or will of the person by whose means it happened, will be murder, or manslaughter, according to the circumstances. Vide 1 *Hale* and *Burn*, title Homicide.

Nicholls.

[393]

MOTION to set aside an award, as against evidence.

There was a counter-motion for an attachment for non-performance of the award.

It was disputed between the parties on a lease for fourteen years and an half, and rent 14*l. per annum*, and covenant that half a year's rent should remain in the hands of the tenant till the last year.

Question, whether the first or last year was meant in which the half year's rent was intended to be retained.

Lord *Mansfield*—Where is the doubt? The current half year is to be in the hands of the tenant, and the half year to be paid when the next becomes due.

It appeared, however, the tenant had three quarters of a year in arrears, instead of half an year.

Lord *Mansfield*—It would be ruin to grant his motion: He has three quarters of a year in arrears, instead of half a year.

Rule to set aside the award must be discharged; and the Rule for an Attachment goes of course.

Prideaux

Prideaux against Arthur.

Court will not grant an information, where the charge is made under false or ambiguous colours, where the words spoken admit of a favourable interpretation; where the party complaining comes late.

[394]

Information for a challenge to a justice of peace.

THIS was on a motion for an information against an attorney for insulting and challenging a justice of peace on such a day, he the justice then sitting in the execution of his office.

It appeared that the attorney called on the informant on a day of session's business, when he desired of one of the justices to know when he might speak with Mr. *Prideaux*; who told him—after dinner. Then the attorney, who represents himself as aggrieved by a charge from a man who came as from Mr. *Prideaux*, of an imposition on the parish by a false bill, and also of the same charge in a letter, threatening to strike him off the roll if he did not clear himself of every particular—the attorney representing himself as surprized by this message, sent and delivered in the presence of many of his clerks, and a positive declaration he should be struck off the rolls—he therefore told Mr. *Prideaux* (as he states and is confirmed by two witnesses) that he expected satisfaction, or was determined to have satisfaction, if the laws of his country would give it him. Mr. *Prideaux* says, that he the defendant said, he expected the satisfaction of a gentleman, but he says also, the attorney offered him the complainant fifty guineas if he would say the will was false: meaning, as he believes, to have an action. This passed when they were at wine after dinner.

The court from this, when the representation would have led any one to think, that the insult supposed to have been offered, happened in the actual execution of his office, and business of a justice; from the ambiguous manner in which the complainant swears,—namely, that the defendant demanded the satisfaction of a gentleman, or used words to the like effect—whereas the complainant himself appears to have interpreted as the attorney complained against represents, if the laws of his country would give it; * and lastly, from the lateness of the application—for the ground of complaint above suggested happened in Trinity term last—for all these reasons the court refused to interpose in a summary way.

Rule discharged.

Attorney.

* Verba non accipienda in duriori sensu contra legem ubi in mitiori sensu et legitimo competant.

Hilary Term, 14 Geo. 3. K. B.

Attorney,

Service of Apprenticeship.

AN attorney took indentures for the service of a clerk —The attorney died before the time expired; articles of assignment were entered into, but failed of sufficient execution in point of form. On these circumstances the court considered as I took it, that the service continued under the old master in order to make it good, there being no defect in the clerk—*sed qu*: Whether the case were not, that the articles of assignment were destroyed by accident.

Seducing Artificers.

ANY of his Majesty's subjects seducing artificers to work abroad, the penalty by 23 G. 2. is 500l. besides imprisonment.

Patent.

[395]

For new Inventions.

IT does not seem to hold true, that a patent cannot be good for a new invention grafted upon an old one. Per Lord *Mansfield*.

Bail Bond.

ASSIGNMENT of bail bond by statute 4 & 5 *Ann.* gives a discretionary power to the court to stay the proceedings.

Venue.

MOTION by defendant to change the venue from London to York, on an allegation that the cause arose at *Newcastle*; and also that several material witnesses reside in the same town; nor does he believe any witness necessary to the plaintiff lives out of it. It was an action on a policy of insurance.

Court: The plaintiff has his election; and unless upon special circumstances, the defendant cannot change to a
F f county

county where the cause of action did not arise, except by consent. Particularly, the venue could not be tried at Newcastle, because there are no assizes there this year; and a policy of insurance (even if there were not this reason,) might as well be tried in one place as in another.

Leave to Compound on the Building Act.

MOTION for leave to compound on the Building act on payment of costs granted; but the court disapproved this motion, by which the poor were to get nothing, and the plaintiff pocket the costs.

Marriage.

MOTION to discharge a woman out of custody, it being suggested that at the time of application, and at the time of her being taken into custody, and since, she was and is a married woman and her husband then and now living, and that she was taken in arrest upon a civil action.

[396] Court refused to discharge her upon motion, there being evidence of the marriage, but none of their ever having lived together, or co-habited; and they suspecting pretence or collusion.

Irregularity.

DECLARATION on *debet* and *detinet*; original on the *detinet* only: The court seemed willing to consider such variance if possible, not fatal.

30th January. 30th January being Sunday, the day was kept the next day after, and the court did not go into business on 1st of February the Monday.

Common Pleas.

Half-blood not inheritable.

Vide Black. Comm. L. 2 Ch. 14.

sec. 6. and the Cases there cited of 10 Assizes 27 and Mich. 19 Ed. 2. folio 628 of Maynard's Edition; but note it is not an impediment to descent of estates tail, nor to succession to the crown.

ON the maxim, that the whole blood only must inherit.* Lord Chief Justice *De Grey* observed, there was a very sensible distinction in the old books *Bracton* 64. *Briton* 251. and *Fleta*, that the heir of the half-

blood

* Hæres non potest esse de dimidio sanguine.
Seisina facit stipitem.

blood shall take by descent from the father, though not by purchase.

But this, though it is evidently a hardship to a family not to be able to adopt it, cannot be now adopted.

The case appears to have been—

A man seised in fee of an estate, marries, and has two daughters; his wife dies and he marries again.

The estate in fee descends to the two daughters as heirs to their father: The mother-in-law entered and took the rents, and they all lived on the estate.

Afterwards a posthumous son is born of this second venture. Question whether after the decease of the daughters, the son could claim the inheritance as descended to him.

The maxim was quoted, *possessio fratris de feodo simplici facit sororem esse heredem*; and therefore that the converse should hold if the son had been a brother of the whole blood, but that the sisters had been in possession under the descent, and that therefore the posthumous son could not take, as being only of the half-blood to them who were last seised. [397]

Agreed, that it is not necessary to receive rent, or that rent should become due, to make actual possession.

Moor 151. 3 *Cro.* 4 *Inst.* 14—5.

That entry will be as good by actions as words.

That actual ouster may be qualified. 275 *Roll's Abridgment*, where one as guardian in socage enters; it is at the election of the infant to treat this as a disseisin, or entry for his advantage.

Cro. Car. 303. Lord *Effingham's* case in the name of *Blundell* and *Ball*.

The mother might have entered for her quarentine, which continued nearly to the birth of the posthumous son; and therefore her entry is not to be presumed a disseisin. 1 *Roll's Abr.* 740—1.

It shall not be in the power of a person who may enter lawfully, to make his entry by a disseisin, to the prejudice of him who hath a right; and so to do that by wrong which he cannot do by right. * 1 *Roll's* 618, where a person enters as guardian, he shall not, by making a lease and reserving rent, make a disseisin. V. the case of Tracy Atkins, 4 Bur. 1 vol.

But here the misfortune is, that the election not being made in the life of those who had a right to make it, it cannot be made afterwards.

F f 2

If

* Quod fieri vetatur ex directo vetatur etiam ab obliquo.
Nemo lucrabitur de injuriâ suâ propriâ.

If there had been no daughters, the posthumous son born in the house is actually seised, and the law, if necessary, would explain the entry of the mother as the entry of the son; (*Moore* 151.) and the possession of the mother as the possession of the son. But here the estate of the daughters is interposed who were last seised, and the posthumous son cannot therefore claim through them, he being of the half-blood; and he who will take as heir in fee-simple, must make himself heir of the whole blood to the person last seised.

[398] Though it is hard law, and we should have been glad to find it otherwise, yet, as the inheritance descended on the daughters, and was not ousted by the entry of the mother; and no election was made in the life-time of the daughters, and the entry of the mother was in the possession of the son, we must determine accordingly, That the posthumous son cannot take.

Salk. 228. It is clearly and rightly admitted that the posthumous son cannot be aided by the statute of *W.* which relieves only in the case of remainders.

Postea must be returned for the lessor of the plaintiff.

Custom.

CUSTOM alledged in the manor of *Kings Swinford* —that a man may be tenant by curtesy.

Also, that estates within the manor are intailable, and that a recovery is absolutely necessary to bar the estate in tail; where a fine would be necessary to bar at common-law.

Contrary evidence, sometimes of barring by surrender, at other times by recovery. The judge upon the trial left it that the custom might be both ways, as in *Everard* and *Smallrey*, *Mich.* 13 G. 2.

That a surrender was the natural way; and if there was a custom both ways the preferable way, as the most natural the most easy, and unexpensive.

King's Bench.

On a special Verdict.*

A. being possessed from his father of an undivided moiety in the county of Mayo, and also of another undivided moiety in the King's county in the kingdom of Ireland; and also of other particular estates of considerable value; makes a deed of settlement, reciting in the preamble his natural affection to his blood, family, and name, and that the purpose of the deed is to settle his undivided moiety (that is his expression) accordingly he does, by a very long conveyance, reciting very specially indeed the situation, &c. and afterwards limitation of the uses; and then follows a clause—"with all my other estates in the kingdom of Ireland," without any limitation of uses.

Sweeping clause will not carry estates of a different nature from those, &c.

Question: Whether estates which he had in the kingdom of Ireland, besides these moieties passed.

Lord *Mansfield*—The question on this deed went on two [399] points.

First: Whether the general words would pass any particular estate not before expressed.

Second: Admitting those general words sufficient to pass an estate not before named, yet there being no limitation of uses, whether this estate should not result to the grantor?

The question admits very easily of the decision on either point—but on the first, which is most difficult, it is to be considered that the preamble of a deed, as of an act of parliament is a key to the whole.

V. Analogy between deed and act of parliament in many respects in the notes on Wynne's Dialogues on the laws of England.

Having declared the consideration of blood, &c. as mentioned in the case, he proceeds to his intention of settling one undivided moiety: Now he had two; one in the county of Mayo, the other in the King's county.

He then goes with the utmost tautology to enter into the most minute and repeated description that could be made; all confined to this estate which descended from his father. He limits the uses, and then comes, what perhaps was the blunder of the transcriber, but take it at the most it is only a sweeping clause of all his other estates in the kingdom of Ireland; by which kind of sweeping clauses, conveyancers often take in every thing relative to what had been before recited,

* This the Case of *lessee of Moor v. Moor* in error from K. B. Ireland.

recited, and which it was possible they might have omitted to enumerate precisely; (and besides it helps forwards a line,) but they never mean to pass any thing new. Now the particular estate in question, is stated to be of considerable value.

Now is it credible this would have passed by so few general words, when such an immense detail was made of the others?

Does it appear in the preamble, that any thing was meant to be settled by the deed, but the undivided moiety only? Is this estate to be carried by a sweeping clause when mentioned no where else? Nor with any circumstances elsewhere to give a shadow of appearance, that it had ever once been thought of by way of passing under the deed.*

Second point.

[400]

Vide Bacon on uses.

On the second point, if it could appear these words were otherwise sufficient to have passed the estate in question; what will be the consequence if no uses have been limited?

Now, the not limiting of any use, goes strongly amongst other grounds to prove that there was no intention it should pass; next there having been no such limitation, the use not passing any where else results to the grantor.

Lord *Mansfield* observed farther, that probably the word said had been left out, and that it might be "All my other said estates," with reference to the undivided moiety.

Mr. Justice *Aston* much to the general effect of the chief justice. And he said he should be obliged to go over the same ground, that he did not think there was any doubt.

The judges *Willes* and *Ashurst* much to the same effect.

Sentence of corporal punishment not to be pronounced on a person in his absence.

Consent of attorney-general where necessary, and how.

ON the case of a person indicted at common law for decoying sailors on board a ship, it being represented to the court, that the crown was inclined to mercy, and the court being desired to discharge him, on some corporal punishment, he being unable, by reason of his poverty, to pay a fine, the court said they could not award corporal punishment in *absentem*.

That the proper way was, the man having been long imprisoned, and suggested to be unable to pay a fine, to obtain a *fit manumissus*. At last, by consent, the court set a fine of one shilling, but observed, for the sake of the rule, the consent

* Clausula generalis ad ea refertur de quibus specialiter præmissum est, ut accessoria earum vel nonnunquam res ejusdem generis secum ferat; non autem nova et diversi generis.

Hilary Term, 14 Geo. 3. K. B.

consent of the Attorney-general, and that upon warrant, was necessary.

The Attorney-general declaring himself authorized to consent, the court made the rule accordingly.

Composition on the Building-Act.

MOTION to compound on payment of costs.

Mr. Justice *Aston*—You have been told before this kind of composition the court by no means approves: And when, out of compassion, the court granted the rule, a few days ago, and the only one hitherto, I find that it would be drawn into precedent. But that, he added, was on particular circumstances, and affidavit of extreme poverty; and that he thought the court ought not to grant the rule.

Rule discharged.

Declaration in Ejectment.

[401]

CASE in *Barnes*, 153, held to be misreported, and on enquiry into the practice if declaration is in Hilary, notice to appear in Easter term, and plaintiff does nothing in Easter, he cannot sign judgment in Trinity term.

Absent Lord *Mansfield*.

Declaration in Ejectment.

MOTION that service of notice in Ejectment on the servant of an insane person might be good service. The servant intended to be served, it was suggested, took care of him, and paid the rents.

Notice of declaration not to be delivered to servant of insane, but to committee.

Mr. Justice *Aston*, in the absence of Lord *Mansfield*, was strongly against the rule, and held that the servant was not authorized to defend the possession of the lunatic. And when possession was to be changed, and a lunatic turned out of his estate, it would be necessary to serve a committee, under a commission empowered to take care of his estate.

Mr. Justice *Asbhurst*—The ground in common cases of service of notice on a servant being deemed good service, is because it is presumed to come to the notice of the master, which cannot hold in this case. *

Common

Common Pleas.

Q U A R E I M P E D I T.

The Reverend Edward Bernard, Doctor of Divinity, Provost of Eton College, with the Fellows of the said College, *against* the Bishop of Winchester.

On a Special Verdict.

THIS was on a claim of the advowson of *Worpleston*, to which the crown had presented.

The verdict states, that King *Charles* the Second was seised of the advowson of *Petworth*, *jure corona*, and afterwards the other succeeding kings of England.

[402] That the Duke of *Somerset* had the living of *Kirby*, and Eton college the living of *Worpleston*.

Saving. That afterwards, by an act of parliament of King *W. 3.* it is enacted, that the living of *Kirby* shall be settled in the King and Queen, and their successors, for ever. That the living of *Worpleston* shall be in *Eton* college. That the Duke and Duchess of *Somerset*, their heirs, &c. shall be patrons of *Petworth*, saving the right of all other persons but the King and Queen, the Duke and Duchess, and *Eton* college.

Presentation of Lord Egremont. It states, that Lord *Egremont* had presented to the living of *Kirby*, and whether the crown be entitled to the rectory of *Worpleston*, they know not.

And they submit the whole to the judgment of the court, in the usual manner.

That the act was necessary to effect the conveyance. Serjeant *Burland* argued, for the plaintiffs, that the act was necessary to effect this conveyance; the college could not convey without an act. The act establishes the conveyance. The crown was to take for ever the living that was to be conveyed from the Duke; the college that from the crown; and the Duke that from the college.

Lord Egremont's claim. Lord *Egremont* claims as against the crown, insisting (under the general saving) on a title paramount.

Possession has been quiet seventy years.

That the crown ought not to attack the fault. The Duke of *Somerset*, having been mistaken in his title, and conveying what he had not right to convey, the the possession of a third because its own has been disturbed, without or privity of the third.

possession

possession of the crown is disturbed. Is the crown, therefore, to come on the possession of the college; and have its remedy against that? The college was not bound to take notice of the Duke's title, to which it was a stranger, and not privy.

There appears to have been a treaty between the college and the Duke of Somerset. The college were, certainly, to see their title; but what consideration the crown was to have, in order to enable the Duke to make this equivalent to the college, was nothing to the college.

If the college lawyers had enquired what title the Duke had to the living of Kirby, which he undertook to convey to the crown, it is to be apprehended they would have been told it was not their business.

That the college had nothing to do with the title the Duke had to convey to the crown.

If it had been the case of a common person, they would have had their remedy against one who had conveyed them a bad title; but not against a person entirely innocent.

[403]
That a common person would have

remedy against the wrong-doer, but not against the innocent.

There is no saving in the act on account of eviction of title; "that if the title should not fail on one part, it should affect the rest." For if this had been the case, it would have been expressed; and if it had been expressed, it would have been void, *ab initio*.

That there is no saving in the act on account of eviction.

This appears to be contended on the principle of the law of exchange; and so if one fails the whole is answerable. But I contend there is no exchange, except where the contract or agreement is between two parties only. I don't say two persons; for tenants in common, or joint tenants, be they ever so many, may be one party. [For each hath one undivided property, as one person, though joint tenants have it by one title, and one right, and tenants in common by several titles, or one title and several rights.]

That if there had, it would have been void as to third persons.

That this is no exchange; because between more than two parties.

Exchange is founded on this idea on the definition of the very text of *Littleton*, l. 1. f. 62. If there be two men, each seised, and one granteth his land to the other, in exchange for land which the other hath.

That the definition of *Littleton* confines exchange to two.

Between more parties than two there is no such mutuality or reciprocity. *Bullrope's case*, 4 Co. 21. the warranty in exchange is only a special warranty, and does not extend to recover in value in any other lands than those given in exchange.

That the reason of mutuality confines it.

Authority.

If

Hilary Term, 14 Geo. 3. C. B.

Vide 62, f. 12. If *A.* gives to *B.* *B.* to *C.* and *C.* to *A.* this may be good consideration, but no mutuality: And there is no privity of estate, or privity of contract. It was properly observed, that wherever there is exchange the word must be used. Vide 9 *E.* 4. *Co.* 51. *Perkins* 253, and *Brooke*, title *Exchange*. Without the word exchange, it is only one thing in consideration of another, and cannot pass without livery, and so here.

That between three there may be good consideration, but no mutuality; ergo, no exchange, and that the word exchange must be used. f. 62.

That in exchange the parties have no freehold till executed by entry. *Co. Litt.* 50. 3. *Mod.* 85. *Fitzherbert's Abridgment*, title *Exchange*, pl. 10. And *E.* 4. 53. If one dies before exchange executed by entry, the exchange is void, and the heir cannot enter as a purchaser.

That in exchange the heir could not have entered, if donee had died. If it had been land, and the donee of the estate in exchange had died without entering, the heir could not have entered.

That exchange of reversion not good without attornment. * In case of a reversion, the same law is, that exchange is not good till executed by attornment, which was necessary by common law.

[*404]

That exchange of advowson not good till induction before the death of one of the parties. In case of a living, in the same books, exchange is void, unless there be induction before the death of one of the parties. Would it, or can it be supposed it would be so here?

That none of these could be supposed necessary here to make the conveyance effectual.

That in exchange estates must be of equal quality, but not necessary here. That as it fails in all the incidents and characteristic qualities, it is not an exchange. To perfect an exchange the estate must be equal. If the legislature had known the Duke had an estate for life, would it not have been good in this case against an estate in fee? I contend, the conveyance under the act would have been as good as if in fee; but *e contra*, if exchange. It fails, therefore, in every one of the ingredients. It has not the words; an entry is not necessary; there are more parties than two, and no need of equality of estate.

If

If this is to be the case, that the act is to be considered as a deed of exchange, it's whole effect is to cease. The new erected churches sink into their original state; the poor not to be maintained by the hamlets; the parishes to be destroyed; (though the act says they are to remain for ever) and all this because Lord *Egremont* claims a paramount title.

That it would totally defeat the act to consider it as exchange

Nay more, if it is an exchange, it is void, *ab initio*; as if one gives an estate for life, and takes an estate in fee; this, by way of exchange, is void, *ab initio*, and not merely voidable.

That as such it would be void *ab initio*, not merely voidable, and that all the parties would be

The rector may be called upon to refund the 10l. *per annum* he has received many years back; and all parties, in the same manner, to refund what they have received.

to refund all they had received.

Farther, if this be to be considered as an exchange, and as a good exchange, the usurpation of Lord *Egremont* cannot defeat it. To defeat an exchange there must be an eviction by elder title; till then it is only voidable.

Farther that if it were a good exchange, Lord *Egremont* could not defeat it without regular eviction by an elder title.

If one of the parties enters by wrong upon the other, the other cannot enter by right upon him, but is put to his assize.

But where the estate was defeasible at first, as exchange by tenant in tail, the issue enters—or exchange by husband having lands *juxta uxoris*, the wife enters, then the other may enter, on him so defeating the exchange. In the case of a stranger entering by wrong, the other cannot enter upon him: And so the books. 9 E. 3. 21 *Brookes*, pl. Exchange, 12, 13. *Perkins* 219.

What is meant by entering by wrong? If one of the parties or a stranger, after exchange perfected, enter; and the title then is to be tried by assize. [405]

And if a stranger enter by title, he must have a legal eviction upon his elder title; otherwise he will enter as by wrong.

If this be the case with a common person, a *fortiori*, in the crown, whose estate can hardly, in any case, be evicted without office found, or matter of record. *Roll's Abr.* If an estate commence by matter of record it must be defeated by matter of record also.* Now the King never takes but by matter of record.

That still more in the crown, which takes or gives nothing but by record.

Suppose

* Naturali æquitati convenit quodlibet eodem jure dissolvi quo ligatum est. Rex neque dat neque accipit nisi per recordum.

Hilary Term, 14 Geo. 3. C. B.

That the King could not recover against the college without office.

Suppose the King's title to have been defeated; and that the crown had a right thereupon to resort to remedy against the college, (which, however, would not follow, if the first were true, and neither admitted) yet even then the King could not recover against the college, without office found. *Stamford, Prerogative, 55.* In all cases where a subject shall not have possession without entry, the King shall not have title without office, or other matter of record.

Cases.

If the King enters, upon a condition broken, he cannot enter without matter of record.

That here not after office shall the crown be entitled without actual seizure. Scire facias requisite.

Nay, if the King's title be found by office to an incorporeal hereditament, as an advowson, he shall not be entitled before seizure; and party may traverse the presentation, without denying the office.

Where a common party would be put to his action, the King will be put to his *scire facias*.

In this case, I repeat, if the crown suffers, by entry or usurpation of Lord *Egremont*, the crown is in the case of all common persons, and must seek remedy against the person who did the wrong, and not against an innocent person. †

That is an act of parliament giving distinct independent interests.

This is an act of parliament; and an act of parliament at the particular request of the parties; and an act which assigns to every one a certain distinct interest, independent on the interests taken by the others. Either it must be repealed by another act of parliament, or all the parties are bound by it, and none can resort to the third for a recompense for what they received from another, without sufficient title.

[406]
Recapitulation.

Finally, I conclude from all, that this cannot be argued upon the principle of exchange: That if it could, Lord *Egremont* must first evict, and that then the crown would be entitled to present, till the title was found against it by office; And that if the crown had a right to resort against the college, on eviction of the title conveyed to them from the Duke of *Somerset*, it must first be evicted, and office found, before it can resort against the college for recompense.

On behalf the defendant, Mr. Serjeant *Kempe*.

States of the parties and conveyance.

The learned Serjeant began with stating the record; namely, that the Duke being possessed under the marriage settlement, as tenant for life, of the living of *Kirby*, the crown being seised of the living of *Werpleston*, *jure corona*, and the college,

† Lex ita prerogativam regis admetita est ut ne hereditatem alicujus tollat in dative.

lege, in it's collegiate capacity, being seised of the living of *Petworth*, the Duke being desirous to exchange the living of *Kirby* for that of *Petworth*, as more commodious to him, and the college being willing to accept in lieu of it the living of *Worpleston*, which the crown was ready to grant to them, in consideration of receiving *Kirby* from the Duke: That to effectuate these purposes, an act of parliament was made. That the crown thereby took *Kirby* as in exchange for *Worpleston*; the college *Worpleston*, as in exchange for *Petworth*; and the Duke *Petworth*, as an exchange for *Kirby*.

That the conveyance had been made under the act of parliament, on the supposition that the Duke, instead of a life interest, had a good and absolute fee to pass in the advowson of *Kirby*, and which fee he covenanted to convey to the crown, in consideration of the crown conveying to the college the living of *Worpleston*, and the college to the Duke the living of *Petworth*. That the Earl of *Egremont* coming in under the general saving of the act, by a title paramount to that of the Duke of *Somerset*, under which the crown claimed, the question now was, whether the crown, being defeated of that title in consideration of which it conveyed *Worpleston* to the college, should not now resort to its original title to the living of *Worpleston*, against the college.

That the crown gave to the college on consideration the Duke should convey a fee to the crown. Question, whether the Duke, having only an estate for life to convey, the crown should not resort to the college.

1st, *Eton* college could not have attained their object of receiving *Worpleston* in exchange for *Petworth*, without the interposition of legislature. The act necessary.

2dly, When legislature did interpose, I contend, here was a true legal technical exchange.

That this was a strict true exchange. That it was the intent of the parties.

* 3dly, The legislature never meant to alter the nature of an exchange; but to leave it as the parties intended and as the law construes it.

Next, I shall contend upon the intention of the legislature itself, that the grant of *Worpleston* from the crown to the college must be null and void, unless the Duke of *Somerset* had a good fee to convey to the crown in the advowson of *Kirby*, according to the mutual agreement of the parties; unless you will suppose the legislature guilty of the greatest injustice in the world.

The intent of the legislature.

[*407]

The last matter will be the title of Lord *Egremont*: And the necessity of a legal eviction, as my Lord *Egremont's* title is incidentally in question, I shall not omit.

The title of Lord *Egremont*.

That

Littleton's
description
of a parti-
cular case.
Definition
of exchange,
mutual
grant of
equal
interests
one for
other.

That this was an exchange—I take that mentioned from *Littleton* not to be a definition but a description of a particular case of exchange. He then goes on to another.

Mutuality
here from
the words
Anno 4 &
5 W. & M.
c. 13.
* Note, the
title in
Russ head
ends at this
mark. *

There is a definition in *Finch*, p. 103, which has not been so faithfully copied as it ought.

“ An exchange is a mutual grant of equal interests one for other.”

The touchstone of assurances does vary a little, “ A mutual grant of equal interests one for the other.” Whether the relative article may make a difference, I will not say: but I chose to take it from the fountain head.

My brother says, there is no reciprocity; no mutual grant—Let us see what the act says. “ An act for dividing the chapelries of *North Chapel* and *Dugton* from the parish of *Petworth*, and erecting them into new parishes, and for settling the advowsons and rights of patronage of the rectories of *Petworth*, *North Chapel*, *Dugton*, *Clewer*, *Farnham*, *Royal*, *Worpleston*, *Kirby*, *Overblows*, and *Catton*, and the vicarage of *Long Horsley**—according to a mutual agreement between one and the other of the parties.”

From the
meaning
and necessity
of the
thing.
Exchange is
mutuality,
and mutuality
may
be between
more than
two.

Thus says the title; and of necessity the agreement is between all three; therefore the reciprocity is between all three, and runs throughout. My brother says, the word exchange is necessarily restrained to two; I don't see the reason. It is a word of mutuality. And *Virgil*, of a swarm of bees hanging from a tree, says they hung *pedibus per mutua nexis*. And in a conveyance of three parts, four parts, and so on, the parties mutually agree. The college of *Eton* as much stipulates and contracts to convey to the Duke of *Somerset*, as they do to take from the crown; the crown as much contracts and stipulates to take from the Duke, as it does to convey to the college; and the Duke as much contracts and stipulates to convey a good and absolute fee to the crown, as to take from the college.

That here
it is mutual
agreement
expressly of
all three.
That the
college is no
more innocent
than
the Duke.

My brother contends, the college is merely neutral. How does it appear? Not on the record, in which it is expressly contained that all three agree; and from whence it originates signifies not a tittle.

It may be said, that the college of *Eton* is intirely innocent. I see not that it is more so than the Duke of *Somerset*, who, I am persuaded, did not know that he was a mere tenant for life.

I never

I never understood, where there were three parties, but that all the parties were equally bound to look to the title of each other.

All parties in mutual covenants equally bound to look to each other's title. Intention of parties.

The next thing is of mutual intention. It has never yet been argued but that, in the view of the parties, the contract was meant and understood by all as of equal interests; in the event it turned out otherwise: The Duke had only an estate for life, expectant on the death of the Dutchess. If the Duke had been seised, as he supposed himself, of a fee, there is no doubt they would have been before the legislature, as having all equal interests.

The next, and the great force of the argument, rests on this, which I cannot go by. "I must see the very word exchange." I conceive the only meaning is, one thing is to be the consideration for the other, and this meaning is abundantly expressed. This is the natural meaning of the act in general, supposing no argument to be drawn from the words; which I shall consider by and by. The crown giving to *Eton, Clewer, Worplesdon, and Farnham Royal*, are to have *Kirby* from the Duke; and the college interchangeably, for it's part, is to convey to the Duke the rectory of *Petworth*.

The very word exchange not necessary; the meaning sufficient; and this meaning clear in the case.

This, therefore, is an agreement for changing over between these three parties, this could never have been contended, as no exchange as between any of these parties and a stranger, *a fortiori*, therefore not as between themselves.

I did listen with some attention to find whether my brother had been more fortunate in his researches, as to the necessity of an exchange being only between two persons. I have looked into *Fitzherbert, Brooke, &c.* and I cannot find even a *dictum* why it cannot be between more than two. I think it was incumbent to have given a reason, as I do not find, nor hear that my brother has found a precedent which says so. Lord *Coke*, in *Bulstrode's* case, says, the reciprocal consideration of one thing given for another, is the ground of all; and from this is the implied consideration and warranty raised.

No authority that the word must be used. No reason given.

Though the case of joint tenants, perhaps, and coparceners, (who, though they have several inheritances, have one freehold) may not be applicable to this case, in the case of tenants in common both freehold and inheritance is distinct. Now tenants in common may exchange with a third person, which goes much, I think, in proof of the reason and prin-

[409]
Tenant in common may exchange tho' both freehold and inheritance distinct; against it.

ergo exchange may be between more than two. No case against it.
ciple.

ciple. If there be no precedent exactly commensurate with the present case, there is none against it.

I come to the last—the “one for other.” The touchstone of assurance says, “the one for the other.” I agree with my learned brother, and will take it from the fountain. It comes then precisely to the case.

Proofs that the word is not necessary

This Gothic word of *excambium* is much relied on. Lord Coke, I admit, is clear that no word will supply it; I do not admit *Perkins* is so clear to this; I admit there is a *dictum* of two of the justices; I admit it is so in *Fitzherbert*, and so in *Brooke*, the one from the other. But *Perkin* says expressly, it may be by the word *permutatio*, &c. or word to the like effect.

Answer to cases cited.

I must beg my brother's pardon, for saying he does not state the 2d — 253, right. It does not say, it has been resolved, but only it is said, an exchange cannot be without the word *excambium*.

A case has been cited by my brother *Burland*, that if the word exchange be not inserted it can only operate as mutual grants. Therefore if *A.* by deed indented, give to *B.* an acre of land in fee, and *B.* grant back to *A.* in like manner, this cannot be good without livery of seisin. But if the consideration had been stated, that *A.* gives *Black* acre to *B.* in consideration of *White* acre given to him by *B.* and this appears upon record, then says the case, of necessity it should operate as an exchange; as if the word *excambium* had been inserted.

Littleton, in his 65 *f.* saith, it behoveth that the land be equal: For if one gives his estate in tail for another's estate in fee, this cannot be good.

Here *Littleton* doth not make it necessary to use the word “exchange;” he uses the word “for,” to operate as an exchange.

To prove that it is not an appropriate word, lands recovered in warranty are said to be in *excambio*.

That in the case of the legislature a liberal use of words is to be intended.

[410]

I contend farther, that whatever might be the case with respect to common persons, with respect to the legislature a greater latitude will be admitted. And a fee will pass without the word “heirs,” by act of parliament, and in conveyance the legislature does not grant and demise, but gives and settles: It speaks not with the nicety and formality of a private conveyancer, but with its own dignity and authority.

favour

Hilary Term, 14 Geo. 3. C. B.

Another thing, this is the case of the crown; and there are a variety of cases where words will raise a condition in favour of the crown, which would not in the case of a common person.

In the case of the crown construction shall be in favour of the crown.

But I choose rather to rely on this being by act of parliament; and I have already submitted humbly to your Lordship an act of parliament, framed and executed upon the original intention of the parties.

The legislature concluded all the parties before them brought an estate in fee; so did the parties: The parties meant an exchange of these estates, as of equal interests: so did the legislature. No defect was then dreamed of, either by the legislature or any of the parties. Whether from oversight, or how, I know not, his grace had not that estate of inheritance which the parties and legislature supposed he had. It is not guess; the parties understood a fee was to be brought; I think it is demonstrable.

Intent of legislature and parties.

The very dividing is stated in the title to be on an agreement between the parties; which, by the language in the outset, is evidently supposed, and which runs through the whole. Now the agreement in contemplation could never be that the crown should give an estate in fee to the college, in order that the college might have an estate in fee to the Duke; and enable him to give his expectant possibility in a chattel for his life, after the life of the Duchess, to the crown. This cannot be the meaning which is to be intended of any of the parties, and still less of the legislature.

Proofs from the words.

The consequence then is, if the crown gave a good title to a fee to the college, they ought to have from the Duke the consideration for which, in the understanding of all the parties, and in the design of legislature, it was given. If they have not that consideration, the college have not the title to the advowson, which, from the nature of the agreement, they took only conditionally, if the crown should have an equal estate of fee in exchange.

The legislature may adopt the agreement of the parties, especially when, from imbecility, they cannot perform themselves; as in the case of *Eton* college. And when they have, the words used by legislature are to be liberally construed, according to the intent of the parties. Lord Coke says, *parliamentum*, *testamentum*, *arbitramentum*, are thus to be construed. And, in conformity to this rule, I beg leave to observe, your Lordship will go on the purview of the statute, upon the intent of the parties, and of the legislature.

That the construction of the act otherwise would argue an injustice in legislature.

[411] If the legislature had understood otherwise, they would have left the Duke and the college without their assistance; they would have made an honourable compensation at least, if they meant to divest the heir.

And they not having relieved any defect, it is to be presumed there was none then thought to exist.

The act is ancillary to the agreement. If this defect had been understood by parliament, they must have given their aid to operate an injustice; which that they should do is an intendment that never will be made.* But I contend, the only view of the legislature was to serve the agreement, and to pass a fee, as they then supposed, in exchange among all the parties; and the agreement failing, the act fails with it: And no part can stand, I farther contend, without making the legislature work a wrong.

How is it to operate? As an exchange? There is no equality of estate: An estate for life on one side, of inheritance on the other: Therefore the exchange is a nullity, and no entry, agreement, acceptance, or acquiescence, can make it good. *Dyer* 353.

If, therefore, it stood on a common law conveyance, it would be null.

Certainly, the legislature never meant to give a *tortious* fee, nor to aid any defect, in a case of this kind.

But it is contended, this is an act of the legislature; and therefore irresistible; and no mistake can supersede it's operation. But, taking it at the lowest, and lower than perhaps, for argument, it might be taken, it is at least an involuntary deception of parliament, committed by a tenant for life taking upon himself to pass a fee: And where parliament assists individuals in their contracts with one another, it will take care that an innocent party shall not suffer by another party deceiving them, whether willingly or accidentally, by a false suggestion: And if there be such a deception, the act is void: It is sure enough a deception will destroy the effect of a conveyance, so it does a grant of letters patent: And where the party himself is bound in conscience to rectify the mistake, where a deed would have been void, where letters patent would have been cancelled, it would be strange if an act of legislature should rivet an injustice on the parties.

This

* *Pa constructio legis semper facienda ut ne cui fiat injuria.*

Leges injusta juberet nunquam præsumuntur—Lex enim injusta, non est lex.

Quod ab initio in se ipsum fuit nulla ratificatione confirmari potest.

This brings me to another consideration—What is to become of the chapelries? I must be understood to contend that they never have been rectories; that they have been chapelries annexed to the living. [412]

I do not see the weight of the objection, that the officers will be indictable for every act they have done. I think they will be considered as officers *de facto*, acting under an authority sufficient to protect their acts: Neither will they be indictable, nor punishable of trespass. That the officers will not be disturbed for antecedent acts.

As to the vesting in the *Duke*, and his heirs, it is not a peculiar vesting, more than to the other parties; and the whole was subject to the condition above-mentioned.

Next, the length of time for which possession has continued has been objected. The *Duke of Somerset* lived till forty-eight; after him his next heir; nor could the right be known till the vacancy, and accruer of Lord *Egremont's* title.

To conclude this part—It was understood by the parties, and by the legislature, that the *Duke* should convey a fee; in consideration of which the crown was to convey an equal estate to the college, and the college to the *Duke*. It was an agreement, I submit, for an exchange, in the true legal sense: It could not be an exchange, unless equal estates passed between all parties. The estates passed could not be equal; for the *Duke* passed, and could only pass, an estate for life, for which the crown was to give, and the *Duke* to take an estate in fee. An exchange, then, of equal estates was the justice and intent of the agreement; this or no other could be its legal operation; to this the legislature meant to afford their assistance. And the agreement of the parties not being possible to be effected, according to their intent, the intent of parliament, law and justice, the whole fails: And the legislature certainly meant the whole, or nothing, should take effect. Recapitulation of the whole.

Next, as to Lord *Egremont's* title, though this is incidental, your Lordship will take notice of it, as affecting the title of the crown to *Worpleston*. He comes as a purchaser, for a valuable consideration, under the settlement. It's left as a doubt, whether Lord *Egremont* had a right to present: I think it could not properly be otherwise on a special verdict. The jury could not properly find he entered by title, it being intended to be left to the court.

I don't find, if Lord *Egremont's* title was good before, that my brother contends much it was taken away by the

[413] act. Even if there had been no saving, I rely upon it, it would not have been taken away.

What legal eviction then? If not barred by the act, because he has a title paramount to the act, and is not named in the act clearly, his presentation is not by any other means taken away.

There can be no title in the crown.

But it is found upon record the crown did present. I shall contend this can operate no more, if there had been a thousand, than a collation. Vide 302 *Salkeld, Hobart*. 6. Co. 29. *Green's case. Vaughan*, 14.

Tufts
against Bi-
shop of
Litchfield
and Coven-
try and
others.

As to the necessity of office found in general, it is true that the crown takes by record, and shall be divested by record: But by act of law the crown may be divested.* Where the crown has a remainder, and the particular estate is evicted, the remainder is evicted also. Where the estate of the crown depends on a condition, the condition discharged, the crown has lost its estate, without office, though vested before.

It appears by the books, when the crown presents by a wrong title, though it has a right, as *jure corona*, when its real title was by lapse, such presentation is merely void; a *fortiori*, therefore, where there is no title at all. And usurpation of title shall not be intended of the crown; but rather the presentation shall be as if it had never been made; not voidable, but void.

I hope, on the whole, your Lordship will consider this as an intended stipulation, by way of exchange, that the legislature adopted it as such; that as an exchange it might have been good at common law, if the Duke had really conveyed what he was understood to convey, and took upon himself to convey; that however, he not having done, nor having been able, by the nature of his estate, to do this, there is no exchange, there being no equality; that therefore the agreement fails, and being a mutual entire agreement, must fail in the whole if in part; and that the act, being meant only to give it aid, if it had been in its nature supportable, fails with it—and that the crown has not been premature in presenting, though without any office—and that its original right shall not be taken away without consideration—that it is too much to say, the crown shall be driven to a recompense against I don't know who. And that, therefore, the
court

* *Melior et fortior est dispositio legis quam dispositio hominis.*

court will concur in thinking the crown is in it's original state.

Mr. Serjeant *Burland*, in replication—My brother says, [414] that what I quoted as a definition, from *Littleton*, of the word exchange, is not a definition, but only an instance; and to this purpose cites a passage out of *Finch*. I do not see the distinction between *Littleton*'s idea of an exchange and that of *Finch*; and that in the touchstone, I think does not vary. There is no hint that I can find in any of the books of an exchange between more than two.

It would be very extraordinary if no notice had been taken. Lord *Coke*, in a chapter or two after, speaks of the difference and agreement between partition and exchange. And where *Littleton* saith partition may be between three, he never says a word of exchange possible between three. "One for other," in sense, and propriety of language, must be the same as "one for the other," to make any thing of it. One for other I apprehend to be bad English; *un pour autre* I apprehend to be bad French; But the relative must be understood in both.

The crown is nominally a party, but substantially the parties are the Duke and the college. With the crown the college made no agreement, unless it be an agreement to receive.

I contend still, that nothing will pass by way of exchange, if the word exchange be not used; unless by livery and seisin: The operation of this word, therefore, is purely to avoid the necessity of livery and seisin.

Put a common person in the place of the crown. A writ of right of advowson brought by Lord *Egremont*, who was the party to vouch? the college could not vouch—Who is to vouch? The Duke of *Somerset* and his heirs; not a third person. What are they to recover in value? What was given by the Duke. The living of *Worpleston* was not given by the Duke.

It is said, tenants in common may exchange, and that this is the most similar case—I am glad it is. They make but one party, [*cui curia assensit*] and if they pass an estate in common, they take back an equal estate in common, as tenant for life, and he in remainder, take back estates for life, and in remainder.

Tenants in common all together but one party.

My brother admits the authorities in *Fitzherbert*, *Coke*, and all the books, about the necessity of using the word; but he says *Perkins* does not require the word *excambium*, but says *permutatio* may be used, or any other word equivalent

[415]

That one land for another does not of itself operate as exchange

Mutuality between two parties only.

The intention of the parties not to be answered by destroying the effect of the act.

Judgment.

lent to exchange; that is, if there be any other word in Latin equivalent to *excambium*, if there be any word in English equivalent to exchange, if there be an equivalent word to which the law annexes the same idea, it will be used as properly: Supposing it were *permutation*, for instance. But giving one land for another does not operate as an exchange. My brother would contend, that *for* is the operative word; for *Littleton* has used "one for another," and must mean exchange. It means it there, because he was speaking of exchange in the very place; but if he had been speaking on another subject, would one for other of itself have implied an exchange? No; for then an exchange would be if an estate for life passed for a fee; which, however, my brother admits cannot be an exchange, because it is not an equal estate. Equality of estate is one requisite. mutuality is another; and a mutual exchange must be between two parties only.

The construction of the act, he contends, must agree with the intention of the parties; this I admit. The preamble declares the intention of the act is the dividing of the chapelries, and settling of the advowsons. [*Curia*, the dividing the chapelries is not in the preamble. This is a mistake of my brother *Kempe's*] As to settling the advowsons, then that would not be answered by annihilating the act of parliament.

As for remedy, I apprehend it will not be contended the Duke of *Somerset's* heirs are not in a condition to make amends: And the college would be greatly injured if, for the bad title conveyed from the Duke to the crown, to which the college were strangers, amends were to be required from them.

Lord Chief Justice *De Grey*—I find, on conferring, we agree in opinion, and will give no farther trouble, though we are always glad to hear you. It may be necessary to state the outlines of the case.

Settlement—Estate to the Duchess for life; to himself for life; remainder to sons, in tail male; remainder to daughters, in tail.

The Duke of *Somerset* had the rectory of *Petworth* within his manor, and was very desirous to get it; the crown engages to give, not for its own interest, a very commodious living to the college, for which the college was to convey *Petworth* to the Duke, and the Duke to convey in value to the crown. The college could not convey without the act.

The

The Duke had a farther object, of uniting three parishes; which the other parties had nothing to do with.

The legislature, therefore, make a conveyance by vesting and settling, with a saving to rights other than of the parties.

The Earl of *Egremont* has his claim under the daughters, by virtue of the marriage settlement.

The crown presents upon the disturbance of Lord *Egremont*, the matter having rested from 1692 to 1760. [416]

Question, Whether the old right of the crown stands to the living of *Worplesdon*, against the college?

The right of Lord *Egremont*, under the saving, stands as if the act had never been made.

In the construction of private acts of parliament we are to go on principles of common law, applied to the subject. If the intention, therefore, was to make a partition, or exchange, the incidents will follow accordingly.

It has been said it is a question, whether the legislature making this conveyance was not to follow the consequences of exchange in it's equality—one of which, it is said, is that an eviction by one party shall defeat the whole, *ab initio*.

Exchange is a possessory act, and by common law might pass by parol, and without livery and seisin; and though this is altered by the statute of frauds, yet it's other incidents remain.

It's not necessary to say whether the word exchange be necessary.

It will be proper to say what is the nature of exchange. It has been said, if tenant in tail exchange with tenant in fee, and the heir enter, the whole is defeated.

It is not necessary equal estates should be in the persons, but the estates given must be equal.

It is observable that no arbitrary effect is derived from exchange; but the effect must be derived from the remedies.

Re-entry is one; which is entire and indivisible, and therefore if a party is evicted, though only of a life estate, yet he must enter on the whole.

This condition of re-entry is not given to a stranger; for it proceeds on privity—but against a stranger.

Suppose now the second party impleaded; he vouches the other; vouchee fails; recovery in value *pro tanto* only: And that specifically of the lands only.

It

[417] It is lineal only, and not collateral: For proceeding on operation of law, the law will not introduce the hard effects of collateral warranty.

Another remarkable circumstance is this, that though acts for establishing exchange are very frequent, yet they who have made this act have made no mention of exchange.

Take it a little farther—And, to consider it distinctly, let us take it more summarily, as on lands.

Acts of a
third party
not preju-
dicial.

A. in consideration of a grant from *B.* infeoffes *C.* with warranty; *C.* infeoffs *B.* with warranty; *B.* is impleaded by *C.* he cannot vouch *A.* who takes nothing.

So here *B.* the Duke of *Somerset*, cannot vouch *A.* the college, because *A.* never had the lands; therefore the loss remains at home; therefore the loss is yet where it should be: The loss remains where the bad title was. If *B.* has no assets the loss remains with *C.* where else should it remain?

In a more similar case—suppose security for an estate made partly by money paid by feoffee, and partly by security given by a stranger. Security of the stranger failing will not evict the estate of the third person. Suppose a conveyance to uses, (without extraordinary covenants) each conveys for his own, the case would be the same; and a mistake in the title of one of the parties, unless particularly guarded against, would not affect a third person.

How does this affect the case; and how agree with it? Exactly *mutato varrinc.*

This is the more reasonable, considering the circumstances of the case. It must have originated from the Duke of *Somerset*: The crown had no interest.

The family settlement was in the hands of the Duke. Suppose it had been before the parliament, they would have taken *Kirby*, and settled *Petworth* in the same manner.

The maxim, *res inter alios acta alteri nocere non debet*, is of weight and application to this case.

The inconvenience which would arise from cross warranty, as well as cross remainders, is a reason why we should not labour to introduce it.

[318] It is said, this is not the same as an estate in lands, an advowson lying in grant. It may be necessary to have a different mode of conveyance, but the rights are the same. And so I think the crown being a party makes no difference, except in the mode of proceeding.

What

Hilary Term, 14 Geo. 3. K. B.

What does the saying do? It makes an estate defeasible, which otherwise would have been indefeasible: And Lord Egremont takes his benefit.

I do not take it as material in what manner they proceeded: For a legal eviction on record would not have affected the college.

Therefore JUDGMENT, I think, ought to be for the PLAINTIFF.

The WHOLE COURT of the same opinion.

5 February. B. R.

Bail.

NOTICE of bail in *Hatton-street, Middlesex*, held sufficient, without naming any parish, though the name is changed within these two years from *Hatton-garden* to *Hatton-street*.

Constables.

IN the case of constables chosen at the leet, to serve for the hundred, I have found the farther arguments and opinion of the court.

Mr *Dunning* observed, that when the question was last before the court, it had been so fully argued, that there could be no need of enlargement.

He observed, that liability to being tythingman could not of itself be any exemption from being constable: For that it is only the same jurisdiction, in different extents.

And here the larger district comprizes the whole of the other; so that the difficulty would be no more for the conjunction of two offices in one person than from the single office of constable to be executed by that person.

That he is liable to do suit at a court-leet one day in the year, is not surely reason of general exemption: And besides it is stated, that by custom the resiants of the manor have been accustomed to do suit at the court of hundred. We don't come upon him for non-performance of suit, but for performance of the duty of constable; to which by the stating upon the verdict he is bound.

The exemption will extend to all the resiants of the leet, if the claim set up be allowed; the leets may run throughout the hundred, and then this exemption applying thus to each leet

leet in particular, and to all in general, there will be none to serve.

Lord *Mansfield*—Mr. *Dunning*, we would spare you and should be glad to know where the doubt is.

Contended on the other side, that the defendant owes no service to any other leet but that in which he is resiant; and that he does not owe to the hundred to serve as constable.

That the nature of a court and the reasons of establishing it, were for exemption from service out of the leet; that as a leet was originally designed to form a common society of persons answerable for one another, anciently a person resiant of the leet, might not leave it without licence from the leet.

That generally a person of an inferior leet should not be liable to do service to a superior.

Coke, on *magna charta* and the statute of Marlebridge, that the chief pledge was to produce the rest; and the pledge who was so called chief was the constable.

That there had been great variety of opinion, or contrariety between my Lord *Coke* and *Hale*; that the latter was of opinion, the constable of the hundred was of ancient institution, antecedent to any statute in being; that Lord *Coke* thought it came in by the statute: That perhaps the difference might be reasonably solved by saying, that the high constable was of new institution, and not anciently distinguished from the constable of the hundred, for that anciently there were no leets but of the hundred.

That the ancient power of punishing was only by distress when present, or by amercement when absent.

That *Keble* 11 *Mod.* and *Freeman* were books of no authority. [Lord *Mansfield* would not allow this of the last, and said Mr. *Hopkins*, a friend of his, would frequently insist *Freeman's* Reports to be the best of all; and that he himself thought very many of them well reported.]

Upon this it was observed, that as to *Keble* and 11 *Mod.* they were not only defective in authority, but that in *Keble*, Lord *Hale* had been made to contradict himself, and in 11 *Mod.* to talk very unintelligibly of a distinction between borough and upland towns; and that admitting *Freeman* of authority, it is very strange he should be the only Reporter of authority who had supported the opinion, and so many of the best authorities to the contrary.

As to the finding, that the jury was to find facts and not evidence of facts.

It

It does not appear any unwilling person was ever forced to come in and serve—the mere use of the word custom will not satisfy the court, they meant to find the custom in the sense of law.

But that they only take it in the common acceptance of the word in the country, and in common parlance; that in another part they had used the words immemorial usage, which here they would not.

Lord Mansfield—If I take it right, there is no authority or dictum that the residents of a leet within hundred are excused; much less that it is good not by custom that they should serve. On the other hand there is the express authority of the case of *Key* reported by two books: And if both the worst reporters that ever reported, yet if they state a very long case the same way in the sensible part, and also in the less material; would you have me think two bad reporters can concur and agree, in saying the choice of constables is no article of the leet, and therefore no excuse that they were within another leet; can I believe they would concur in saying this, if no such thing had ever been said. 11 *Mod.* goes so far as to say that the choice of constables is no article of the leet; and that if the general exemption failed, yet prescription would make it good.

As to the custom I think they have found sufficiently on the words; and no man can doubt the meaning. I should be sorry, if I could help it, to send them back to try it all over again. They find there hath been a court held from time whereof the memory of man runneth not to the contrary: And that by ancient custom, constables were eligible and elected in the court leet of the said manor, from amongst the residents of the manor to serve as constables for the hundred: They find an ancient custom in a court of immemorial existence; the custom is to be intended as coeval with its existence—if not the jury would have found otherwise and stated its beginning.

Mr. Justice Aiton observed, that a man might not be liable to do service at two leets in the same respects, and therefore not to find pledges at two leets: But that the constable was an article according to *Hale*, not within the leet. Vide *Shower's cases, Bettsworth*.

Mr. Justice Willes said, that it appeared from the case in *Keble*, that the exemption which might be claimed only operated *pro tanto*.

New Trial.

ACTION upon a policy of insurance from Grenada to London, with the usual covenants, and that the ship should sail to and from Grenada.

The ship sailed, and on his return the captain stopped at Antigua, meaning as it appeared on the state of the evidence to go home, and not to continue captain the whole voyage. The ship laid at anchor off Antigua thirty-six hours.

The ship on return was lost.

Question: Whether this a deviation? One side Lord *Mansfield* observed, contended that every innocent delay was a deviation; the other that a deviation must be a crime; his Lordship reported his directions to the jury. I told them the insured was obliged to find a captain or person to take the conduct of the vessel; that it appeared this delay was owing to the staying for a mate. At that time in my own mind I was inclined to think it a deviation, but I left it to the jury, they found it no deviation.

Mr. *Wallace*—That the captain, in doubt of the abilities of the master, endeavoured to get a mate. That the ship was becalmed off Dominica; that the captain endeavoured in the mean while to get a mate; but failing went to Antigua directly. That there was no express deviation, for that it is not pretended the ship was out of the line of her voyage, no time spent in trade for himself. Nothing more was done than what proper care required to prevent the loss of the vessel; and nothing more than setting the master on shore and returning directly. As to accidental circumstances of what storms he might either have fallen into or avoided by this necessary and prudent step, that this will not vary the case.

Mr. *Dunning*—That there was nothing to vary the case as before the jury and that to them it was very properly left; that the delay was for the interest of the persons concerned in bringing this action.

Mr. *Mansfield*—For the new trial.

[422] That the evidence went sufficiently in proof of a deviation; that whether by going fifty or an hundred leagues out of the way, or by loitering in the harbour, it would be all alike.

That

That the ground was altered from what had been taken upon the trial; for then it had been attempted to justify the deviation, but now to prove there was none.

As to necessity, which was the ground on which the captain himself had rested, he might have got a mate at Grenada; that it was no excuse that the men in the vessel were not capable, for proper men ought to have been provided when they set from the port of departure. He concluded with observing, that he thought the jury were men not much acquainted with questions of that sort; to which Mr. *Wallace* answered that one of them was a captain of a ship himself.

Mr. *Bearcroft*—That it was a very plain case for a new trial, and that if any thing better had been possible to have been said, Mr. *Wallace* would never have endeavoured to excuse the deviation, by saying the captain carried on no trade for himself.

Lord *Mansfield*—The inclination of my mind is much the same as on summing up; but I doubt on such a case when the jury have found the verdict whether there should be a new trial. They set sail from Grenada, no necessity for delay, if the master had been sick, or one of the men died, they might have delayed twice as long without any ground of complaint from the delay.

There has been no fraud, no intention of carrying on trade for themselves, this does not indeed alter the point of law; but may alter the reasons for granting a new trial after verdict.

Mr. Justice *Aston* seemed to think it was not much material when they changed the master of their voyage, or when they set out: And it might be more expeditious at *Antigua*. And as to illness he says he is well at present, but by the subsequent letter he says he has been ill.

Mr. Justice *Willes*—If there had been no finding I should have been at a loss how to direct; they certainly were bound to set out with proper men. It may be dangerous however to construe thirty-six hours delay fatal, for it would be very hard for commerce that such a delay, for which there was a good reason for the security of the ship, should be held of such prejudice to the captain: Though perhaps he would have done better if he had avoided the delay, by providing all things necessary before he set out; there would be no drawing the line, a delay of five hours might be construed a deviation.

Hillary Term, 14 Geo. 3. K. B.

If the court think it necessary to take time I shall be very ready; but I see at present no cause for setting aside the verdict.

*Of deviation where it shall charge and where not, vide Parker's Laws of shipping and Insurance 320—322, 330—365.

Mr. Justice *Asbhurst* held that the captain appeared, however it might be, evidently to have done his best for the safety of the vessel; and that after it had been tried by a jury of merchants * he should be very unwilling to unsettle.

Court discharged the Rule.

Pew.

Filke and Rout.

On a Motion for a prohibition.

PRESCRIPTION laid that he and his ancestors, and those whose estate he hath, have immemorially held and enjoyed a certain pew.

Contended, that it is not good without shewing that he repaired, or his ancestors, &c.

Mr. Justice *Ashton*—It certainly needs not be alledged on a declaration; nor farther needs it be proved. The pew might never want repairs: Or be it as it will, if a man and his ancestors have held time which no man can remember to the contrary, (for I don't see that it is necessary to prescribe from R. 1. *) surely this is sufficient to support a claim of right; the repairs are only evidence.

Lord *Mansfield*—Yet it is not barely by setting in it; for that may be by leave from the ordinary.

Mr. Justice *Ashton*—Being immemorially used with the house is ground of prescription, or building the pew may be found a title.

[424] Mr. Justice *Asbhurst*—Perhaps as a claim against common right it may be in the case of toll, which requires consideration to be alledged and proved. Mr. Justice *Ashton* I should be very glad to hear the case argued.

Accordingly it stood over:

Mr.

* From the reign of R. the first has been the commencement of legal memory ever since from 3 E. 1. ch. 39. Vide 2 Commentar and continues to be so now, tho' from the latter period to the present year 1776, is a space of 501 years.

Mr. Justice *Aston* said, that if they meant to argue the case he should be glad to hear it argued when the court was full, and to know if they had any cases.

Mr. *Wallace* mentioned the case of *Kenrick and Taylor*, *Wilson's Rep.* 326. where Lord Chief Justice *Lee* said it was not necessary to shew repairs against a wrong doer; because it was a rule of law, that you need not shew any cause against a wrong doer, but of the ordinary it is otherwise; for of common right he has the disposal of seats, and repairs must be proved, for you cannot oust the ordinary without shewing consideration.

Mr. Justice *Aston*—As to the ayle the ordinary had it not of common right but it will be intended the person who prescribes was the builder of the ayle; and if otherwise it must be alledged. And where the allegation is necessary, and not laid in the declaration, it will not be presumed; and accordingly where the scienter was not laid in an action for driving a mad bull—bad, though there was a verdict for the plaintiff. And so the case in *Salk. Buxendin and Sharpe*, and a case in *Lutwyche*; and therefore where repairs are necessary, they cannot be intended without being alledged. 2 Salk. 661

Mr. *Wallace*—That in the case of toll it was necessary to prove consideration, but not necessary to alledge consideration.

And also the distinction concerning the situation of a pew. *2 Inst.* 306. 12 Co. Vide Wood's

Mr. Justice *Asheurst*—That they might amend the suggestion before the prohibition issued. Inst. B. 1. ch. 7. p. 89

Mr. *Cooper*—That prescription for a seat in the church was in itself of a temporal nature, and generally went along with the freehold; and therefore that the suit was in its original, *coram non iudice*. Case of *Loyd*.

Mr. *Wallace*—That where there is a disturbance in a pew, the ordinary has a jurisdiction.

Mr. *Cooper*—Where it is first brought here the court will draw the trial to the common law; though where they commenced in the ordinary's court, there might be no original defect of jurisdiction.* [425]

Rule to shew cause why suggestion should not be amended thereupon. Vide *Siderfin* 89 and 361. *Barrow* against *Keene*.

* Accessorium non ducit sed sequitur suum principale.
Omne magis dignum trahit ad se minus dignum.
Ex demum veræ leges existimandæ quibus omnes assensuerint.

Hilary Term, 14 Geo. 3. K. B.

Bonley v.
Lee.

Keene. 3 *Leving* 72, was also cited which is to this effect. A prohibition was moved, suggesting that the trial of letters patents and all grants of the crown is at common law, and not in the ecclesiastical court; and that the defendant had libelled against him for tythes upon title to the rectory by letters patent from the crown more ancient. Resolved, that the foundation of the suit being the tort in withdrawing the tythes, and the title only an incident, the court shall try the temporal matter so long as they proceed as the temporal law would in such case; but when they proceed in a temporal matter otherwise than the temporal law would, they are then to be prohibited; but not before. In *Lev.* are cited 1 *R.* 3, 4. 12 *Rep.* 66. 3 *Cro.* 466. † 3 *Cro.* 788. *Baker and Rogers*.

Nelson v
Sharpe 3
Croke, here
is what is
commonly
called 1 Cro
or better,
Cro. Eliz

Note, The next case in *Levinz*, *Ashley* and *Feckleton*, seems very full to the principal case of *Fiske* and *Rout*.

Action on the case—Plaintiff declares that he is seised of a messuage; and that he and all those que estate he hath, have time out of mind had all the seats, and the sole sepulture in the church; and that the defendant disturbed him.

After verdict for the plaintiff, in arrest of judgment, that he had shewn no consideration, in not prescribing to repair. To which it was said, that against a stranger, or wrong-doer, no title or consideration is necessary to be shewn; but where he claims against the ordinary himself he ought to show some cause, as building, repairing: And so upon that report it seems to have been resolved, *per curiam unanimiter*.

IN the case above of the indictment for driving over a child, I have found the court were of opinion that the second was sufficiently laid, and had evidence to support it.

[426] Mr. *Dunning*—That there was disagreement between the evidence, whether the horses were trotting or walking; and that to support the second count, there was not evidence that any of the king's subjects were frightened or endangered. That the whole misfortune arose from placing the child in a very imprudent situation, and leaving it there, in a public street. That the unhappy event was, in some degree, imputable to the drayman; but much more to those who placed the child there. And that the object of the action

† Quod prius in tempore potius in jure.

Quolibet evidentiâ juris sive facti plus aut minus valet secundum eam contra quod interdictitur firmitatem.

Hilary Term, 14 Geo. 3. K. B.

action was, probably, the deodand, by the particular finding concerning the wheel.

That the indictment charges misfortune or mischance, which are known otherwise than as crimes by the laws of this country.

That if the evidence proves any thing, it proves something not charged in the indictment; and therefore, at any rate, too much or nothing. And therefore that the verdict is void.

Lord *Mansfield*—It was very properly left to the jury upon the second count. Here is a dray in the streets of London; going a faster pace than a trot; (it is said in the evidence between a trot and a gallop) it appears he was twenty yards behind the horses: The people were terrified, and cried out.

It is said on the other side; he was at the horses' heads; but this is contrary evidence very proper to be left to the jury. And it weighs very much with me that he ran away immediately, driving as fast as he could.

Award.

ON a dispute about a church-rate, one party offered a submission: But it was contended, that the matter being originally of ecclesiastical cognizance, they should go for a definitive sentence into that court.

Lord *Mansfield*—Is not a submission stronger than any sentence? If they will not take a submission offered, with payment of full costs, I will consider of it this time twelve-month.

New Trial.

ASSIGNEES bring an action of money had and received, to recover debts due to a bankrupt. Evidence of commission sued; docket; petition to the lord chancellor, in the usual form; bond to prove the bankruptcy. All these proceedings by the defendant. [427]

After all this a letter to the bankrupt was written by the defendant, who had done all these acts, offering to stop proceedings under the commission, on payment of 500l.

The money paid, and defendant contended against the fraud, though all the world besides may be permitted to controvert it.

H h

assignees,

A false or collusive act shall conclude against the parties to

assignees, that no act of bankruptcy was committed, till a time subsequent to this payment.

Lord *Mansfield*, in making his report, said he was of opinion, on the trial, that it lay not in the mouth of the defendant to say this, when he had gone through so many proceedings, extremely unjust and oppressive, in any other view.

Whatever it might be with respect to other persons, * I thought it conclusive against the defendant, and I left it to the jury, whether they believed these acts of the defendant fraudulent: And then if they did, that as to the point of law, my opinion was, the assignees needed not to shew any other evidence, so far as defendant was concerned; and especially as the docket was not withdrawn on the ground of new information, but on the express terms of the money being paid. This I thought was as strong as any thing could be.

Mr. *Davenport*—When I state them claiming as assignees, they ought to prove the bankruptcy not by the weakness of the defendant, but by their own strength.†

That if the question had stood on the particular time of bankruptcy, the defendant's acknowledgment must have concluded him; but not if there was no act of bankruptcy then, or even now.

That the petition and bond, &c. were no proofs of bankruptcy.

If there had been any doubt, whether act of bankruptcy, or not, and the defendant had collusively assisted in attempting to make colour of it as one, then I admit, on the force of the case, that the assignees might have come against the defendant.

[428] Lord *Mansfield*—The whole argument seems to turn in a circle; that assignees, when they bring an action, must shew an act of bankruptcy committed; and then it begs—that there is no proof.

The propriety of proof must depend on the party concerned: His declarations are evidence against himself; his writings are evidence; much more his oath is evidence.

And so in a case which frequently occurs, suppose a creditor to agree with a trader, that one shall come and ask, and

* Res inter alios acta alteri nocere non debet.

Allegans turpitudinem suam non est audiendus.

Allegans contraria non est audiendus.

Nemo lucrabitur de injuria sua propria.

† Quilibet debet causam tenere sua vi; non imbecillitate adversarii.

Hilary Term, 14 Geo. 3. K. B.

and he shall deny himself, and they take out the commission by collusion. The parties shall never be permitted to say it was by consent and covin; the bankrupt shall never be permitted to say so: And this was decided in a capital case,* that the bankrupt shall not come a year afterwards, and plead it was agreed between them, and therefore no real bankruptcy. But yet this should not be a bankruptcy, as against a *bona fide* creditor. And there is not a more beneficial point in the law.

* Perrot's.
The doctrine is similar of fines and voluntary conveyances.

The extortion is sufficient evidence against himself. He shall not say, "I acted very cruelly, and with great extortion; but there is nothing in my admission of the bankruptcy, which was void and false."

If he could have shewn any thing that he was innocent; had withdrawn the docket, on better information, and had taken no advantage; so that he could have denied the bankruptcy, consistent with innocence, it would have been sufficient.

And thus the evidence was left, not as conclusive, indeed, but very fit to be left to the jury; and very properly they found, I think.

Mr. Justice *Aston*, much to the same effect; relying principally on withdrawing the docket, on payment.

Evidence.

WITH respect to the case of *Jones and Randail*, I have a little memorandum what was said by Lord *Mansfield*, on the first motion; which, because it more fully opens the nature of the evidence of a Minute-Book of the House of Lords, I insert here.

Lord *Mansfield*—There is no difference between the Journal and Minutes: For there is not a word added upon the journal. And it is not a loose minute book, but a regular solemn judgment, is read the second day, and then every word of it is entered upon the book. [429]

There has been a doubt, whether the minutes of the House of Commons could be admitted, because not a court of record: But they being evidence of public business, that objection has now ceased. Are the books of the House of Lords to be carried all round the kingdom, when every person has a right to resort to them? How great would be the inconvenience!

As to previous proceedings, the whole point turned here, whether there had been an appeal and decree: So that there

was no necessity to give the previous proceedings in evidence.

Return.

THIS cause was argued on Friday the 23d of November, in Michaelmas term 1773, and now came on for judgment on the ninth of February 1774.

On an action of trespass and false imprisonment, defendant pleaded a special justification, on a capias out of the sheriff's court, on a cause before that court, having jurisdiction of the same, in which the defendant levied his plaint, whereupon proceedings were had, which the case set forth, and a capias issued from the said court, commanding him to take the body of the defendant, &c.

To this plea there was a special demurrer, containing three exceptions.

1st, That the cause of action was not set forth; only that he levied his plaint.

2dly, That they have not shewn the return made to the writ.

3dly, That they have not shewn the day when returnable.

And first it was contended, from 2 *Roll's Abr.* that if the officer who takes the defendant does not return the writ he is a trespassor, *ab initio*.

Moor, 57.

To a pluries replevin you must return.

2dly, when you justify, you must shew the cause of action.

2 *Lutwyche*, 295.

[430] 3dly, Return must have a certain day.

2 *Danv. Cro. Jac.* 323.

So that generally, though a court be held from three weeks to three weeks, yet the return must not be at the next court; but the writ must have a certain day of return.

Lutw. 914, 925.

3 *Levinz*, 194.

On the other side, that where the arrest was on mesne process, it seemed the rule was as Mr. Buller had stated, but not on process of execution.

That in the case in *Salkeld*, the principal determination was not what Mr. Buller speaks—that the case is also reported, Lord Raymond, 462, and 4 *Mod.* 396, and expressly

pressly held to be so distinguished. On *mesne process*, as *capias ad respondendum*, greater nicety is required.

So in *Fuller's* case, in the reports, 5 Co. 90, *scire facias*, the execution was held to be good, without return of the writ.

So if a man be taken on a *capias ad satisfaciendum*, the execution is good, though the writ be not returned; for the plaintiff has the effect of his suit, without any thing farther to be done.

Nor are these authorities confined to disputes between the parties, and where the sheriff is party. *Lane. Case of Doiley and Joliffe* against the sheriff, same distinction taken between *mesne process* and execution.

That in point of practice, no return is ever made to a writ of execution; unless it be for a special purpose, to proceed against the plaintiff.

As to stating the process, 1 *Lev.* 81. it appears, that if the court proceed erroneously, action shall not lie against the officer for false imprisonment.

That nothing but prolixity in pleading and encrease of expence would follow.

As to objection that the precept stated is void, this is no foundation for an action of false imprisonment.

Mr. *Bulley*, in reply—That all the cases he had cited, [431] except the first, were stated to be on execution: And that even the first appeared to be so.

Between the parties the distinction holds, but not with the sheriff's officer, who must pursue the authority, or else by the cases before cited, 2d *Danv. Cro. Eliz.* and *Cro. Ja.* he is a trespassor, *ab initio*. With respect to the parties who cannot return, they may avail themselves of the writ, though it be not returned;* but otherwise of the sheriff, whose duty it is to return. Case 4 Co. 1. which speaks of liberate, does not affect the argument; for liberate is not an alternative process. The case in 5 Co. is between the parties.

How far the case of *Gwyn* and *Poole* may go, I will not say; but I think it cannot extend so far as to make it material to this point to enquire.

In the second case it was only the officer who justified, and the officer is not cognizant of the action, but the sheriff and his deputy is.

As

* Lex neminem cogit ad impossibilia.

As to the third, Mr. *Chambers* says it's only error. This is all I would have it; for this is confessedly enough to ground the action against the parties; for then the imprisonment is without authority. The officer, indeed, is not cognizant to it, as said before; but if bad for one, it is bad for both.

Lord *Mansfield*—I will look into the cases: It tends to settle a point of practice. I own I wish the defendant may be right; I don't believe, in fact, they ever return execution.

Afterwards, on the ninth of February 1774, as above, his Lordship delivered the opinion of the court to this effect:

After stating the case, and points of law made on the demurrer, *ut supra*.

As to the first objection, that the cause of action is not set forth, only that he levied his plaint. You will see in *Lily's Practical Register* what the nature of a plaint is in this inferior court. It's in the nature of a short declaration.

Lev. quandam querelam suam infra jurisdictionem.

[432] 2 *Perk.* 914. The defendant sets forth much in this manner.

Formerly the courts were much stricter with respect to the inferior courts; nor would presume any thing as to the process.

2 *Lev.* 71.

Raym. 81.

But 2d *Mod.* 95. The plaintiff alledges generally, without saying what kind of trespass.

As to the point of not shewing he became indebted within the jurisdiction, the same liberality is to be used. If the defendant really and fairly had meant to avail himself, he would have pleaded to the jurisdiction;* or it would have been bad by error. The same objection was overruled in *Common Pleas*, 31 G. 2.

The second objection, of no return, depends upon the distinction between a mesne process and execution.

5 *Co.* 90. *Bowe's case*; and the reason, that nothing more is to be done.

The case cited by Mr. *Buller*, as a principal ground, it appears, was on mesne process.

The case in *Salk.* 429, was in replevin.

5 *Mod.*

* Qui non negat ubi debeat et possit, facetur.

Hilary Term, 14 Geo. 3. K. B.

5 *Mod.* The court said, "the officer is not punishable if he does not return the writ.

The third objection, that the return day is not shewn forth. All the cases are either upon mesne process, imparlance, or jury process.

It is admitted to be good when the appearance is enforced, and party brought into court.

2 *Cr.* 48. 2 *Cro.* 284.

The reason why the day should be shewn certainly on mesne process went upon a different ground.

The last case, 2 *Mod.* 59. assault brought, and false imprisonment.

As to the exception of *ad proximam curiam*, instead of [433] setting forth the day when returnable, the chief justice held it bad, for want of this, but the three other justices held it good. And how can the return be certain when the judgment is *de die in diem*?

We are all three of opinion that the Plea was good, and Judgment ought to be for the Defendant.

Affidavit.

Not to be defamatory.

LORD *Mansfield* observed, that the affidavits of the court were never to be made subservient to defamation, and complained (as he had done on a late occasion) of the practice.

Sheriff.

IT seems, on enquiry into the practice, the sheriff cannot have poundage till the goods are sold.

Privilege.

A Man arrested in attending the process of the court. He proceeded as for a contempt against the party arresting, and brought his action for false imprisonment. His attorney made up the action, on the defendant's release of the debt, and payment of costs. An attachment was moved against the attorney, for having compromised the matter without the consent of his principal.

Court

Hilary Term, 14 Geo. 3. K. B.

Court said he was very right ; for that the arrest was good, though officer punishable for the contempt.

Insolvent Act.

[434] **D**E B T due before the discharge, but *solvendum in futuro* at a day subsequent to the discharge. Question, whether the debtor was discharged from this debt? Mr. *Lucas* contended he was. Lord *Mansfield*, on the sudden stating of the case, seemed to doubt; and Mr. Justice *Ajlon* said it would be proper to look into the cases. And now Lord *Mansfield* told Mr. *Lucas*, that he (Mr. *Lucas*) was very right; and Lord *Mansfield* said he had been reminded by his clerk, after the rising of the court, that he had made twenty orders accordingly. It is when the money becomes due, not when payable: When the contract is upon a contingency, it differs.*

Jenkins and Jennings, Bur. 82.

2 *Str.* 249.

This was on the 5 G. 3.

Mr. Justice *Ajlon* observed, the words on the 12 G. 3. were much stronger, contracted, accrued, caused or growing due.

Parish Clerk.

Mandamus.

ON a motion for a *mandamus* to restore to the office of parish clerk, the *mandamus* was refused, the party applying not having shewn any title, in the opinion of the court; and it appeared there was a *plenarty* of office; for the office was full of the principal: And the court would not grant a *mandamus* to admit a deputy.

Admitted,

* Thus a legacy to *A.* payable when he arrives at twenty-one, shall be paid to the representatives of *A.* if he dies before. But "I give to *A.* when he arrives at twenty-one years," is a lapsed legacy, if he die before. And the difference is, whether the time is annexed to the substance of the grant, or the grant absolute, and the time annexed to the payment. A trust to executors until *A.* arrives at twenty-one; and when he has attained that age then to *A.* is a present legacy; and if *A.* dies under age, will go over to his children.

- *Vide Goss v. Nelson, Bur. p. 226.* And vide the case, p. 228.

Hilary Term, 14 Geo. 3. K. B.

Admitted, that an action for fees would lie. And the appointment of a parish clerk may be good, it seems, without writing.

Habeas Corpus.

IN return to this writ a married lady was brought into court who appeared to have been extremely ill used by her husband; he demanded her to be restored to him.

It appeared she had been taken out of his hands by her own consent, and for his security.

On her appearance in obedience to the writ the court said, if she had any thing to say they would hear her and would take care, if it was necessary, not to let her husband take her as she was coming back. And that a tipstaff was in such instances sent; But if she would say nothing the court would not. [435]

Lord *Mansfield* said, That the court would never grant farther than that a person appearing to legal process, should not be in a worse condition than before. *

The court does not say but that he shall answer if he takes her; the court sometimes will say that they will not interpose when he takes her in court; and in the case of an infant the court has declared so. V. Bur.
606.

Mr. *Dunning* was contending, that unless where there was a separation or marriage denied, the court would never interpose to protect a females return.

On the other hand it was said, I think, by Lord *Mansfield*, that this interposition for the safety of the wife's person, was what the court would always exert on due application and proper grounds.

The lady said she should be glad to be mistress of her own free person; as she had been separated from her husband for ten years.

Lord *Mansfield*—Madam, It is not in my power to divorce you, but I give notice the court will never suffer the husband to take her on return, when brought up by an *habeas corpus*.

Notice being given to the court that he waited at a neighbouring coffee-house, to seize her on her return, the court sent a tipstaff to bring him into court, and on his appearing there Lord *Mansfield* said to him, I thought you had been better acquainted with the practice of the court, (for he

The protection of party and witness attending process, *cundo, mandando, re-
dunce*

he was an attorney) than to think you might seize your wife on her return from the court : We had expressly declared, and the court will never permit it, unless they say so. Even to a witness (much more to a party), the court gives full protection, going, continuing in the court, and returning.

If you had dared to seize her until her return home, (by which I mean wherever she pleases to go) I should certainly have committed you. The court will never endure its process should be made subservient to this, against a person who comes up in obedience to it.

[436]

Society of Grays Inn.

ON a dispute whether rateable or not which stood for trial—Motion to stay proceeding on a suggestion of a petition in parliament, without any other suggestion of any thing that might make it wrong to proceed, or that effectual justice could not be done in the cause.

Lord *Mansfield*—The strongest reason that could be for their going on to trial, that they have applied to parliament; the parliament will then see what is the legal right.

Rioters.

IN case of some persons convicted of a riot at Dover, of a violent and dangerous kind, and who were brought up to receive the judgment of the court. Mr. Justice *Ashurst* pronounced the judgment which was, that the court on their conviction set a fine of 100*l.* each on two of them; as to the other two (for there were four) on affidavit of their having a family and not being worth 5*l.* after payment of their debts; the court adjudged, that they be imprisoned for six months each.

Motion: That the prisoners might be carried down to Dover and imprisoned there, instead of being in the prison of this court: Thus much argued that it was in the power of the court.

Lord *Mansfield* said, he had no doubt of the power of the court over all the prisons in the kingdom;* but would not interpose without precedent in such a case; for that it was a very great riot, and man's life had been endangered.

Rule

* So in a case in Sir James Burrow, all the prisons in England are the prisons of this court.

Hilary Term, 14 Geo. 3. K. B.

Rule to shew Cause.

W H E N you move for a rule to shew cause on the **Rule of**
day before the end of the term, the rule must be **practice.**
drawn specially for the last day.

Place.

P L A C E of waiter to the commissioners of the customs
is not a place to take away the benefit of the insol-
vent act.

Easter

Easter Term,

14 Geo. 3. 1774. K. B.

Note, Serjeant Burland succeeded this term, as one of the puisne Barons of the Exchequer, in the room of the late learned and much regretted Judge, Baron Adams, who died of a fever on the circuit.

Certificate.

CERTIFICATE in discharge of a bankrupt pending the suit operates in the nature of a release.

Award.

TIME elapsed, which is limited by the statute for proceeding against an award; they applied for an attachment for non-performance of the award.

To this motion it was suggested in discharge of the attachment, that they were at issue in the court of exchequer, on the validity of the award.

Lord *Mansfield*—We have nothing to do with that—the statute binds the court of exchequer as well as this court.

New Trial.

MOTION for a new trial.—Verdict had been found for plaintiff, on evidence of a conversation by one of the witnesses. Affidavits were offered of an *alibi* at the time of the conversation alledged sworn to, namely, that the person who swore was then in another place.

Court

Court granted a rule to stay proceedings till the trial of [438] the indictment, with liberty to produce a copy of the indictment in evidence, in case the witness should be convicted.

Femme Covert.

BY a rule of court money had been directed to be paid into the hands of a father for the benefit of his daughter, who was a femme covert.

The father refused on apprehension of an action. And now the court was moved, that the money may therefore be directed to be paid into the hands of another person, named on behalf of the femme.

The court said this in the case of a femme covert was analogous to levying a fine, or examining before chancery, and therefore she must appear in person.

Justification.

NO justification of bail signify any thing after the sheriff has been ruled.

Issue.

YOU cannot sign judgment for non-payment for the issue, until demand and refusal.

ON a motion to set aside an order founded on the 9th of G. 3. for building *Black-Friars-Bridge*.

There is a compulsory power to buy in lands for the better building of the bridge, in case no agreement can be made; this power is given to the mayor, aldermen, and commonalty in common council assembled.

It appeared upon the case stated, that the complainant against this order was a mortgagee and so stated in the order.

2d. That the order imports to have been made by the mayor, commonalty and citizens.

3d. That the mesne proceedings before adjudication are [439] all in the past tense and not in the present: And upon these several grounds it was contended the order ought to be quashed; there was another point that they have stated the order to be in pursuance of the act, without saying in what manner.

And

And first, That by stating the complainant to be mortgagee they have not shewn a case upon their own stating, whereby it appears they were impowered.

2d. That there is no such corporation as the mayor, commonalty, and citizens of *London* described in the act.

3d. That the past tense instead of the present was against precedent, and all the reason of the law which supposes all matters before it be done *eo instanti*.

4th. That acting under a special authority they should have shewn specially how they had pursued that authority.

To this it was answered, first—that mortgagee was within the general words of the act “all persons seized of any estate or interest.” Now a mortgagee has a legal estate in the term and an equitable interest in security.

2d. That the act does not mean that it shall be necessary to give the corporation of *London* a new corporate name; and that the proper corporate name is mayor, commonalty and citizens.

That it would defeat the end of the act, if you were obliged to buy many acres, in order to come at a few.

As to not using the present tense in proceedings, that this would have been absurd speaking of things not done until after.

In answer to this it was replied, that all acts which compel a man to part with his property in a summary way must ever be pursued strictly, and the power be fully set forth whereon such an authority is given, derogatory to the common law. As in order of justices for removal of a pauper, it must be stated complaint was made by churchwardens, that it may be seen the question came properly before the court. And if the removal be on the statute of King *W.* it must be stated, that the pauper was likely to become chargeable, that it may appear they had just ground laid before them of removal.

[440] “In pursuance of the act,” without stating in what manner, is only telling the court, that in their conceptions, they have done as the act directs; which might equally be an answer in any case, however erroneous, illegal, or oppressive. The court is to judge whether they have proceeded according to the act, not on the credit of such a general declaration of themselves in their own case, but by seeing, on legal evidence, how they have acted. And this evidence, if they were in the right, they ought to have laid before the court.

As

As to *præstitit*, it is certainly wrong; for the law presumes all its proceedings to be on record the instant the facts arise. And there are cases which prove that such a variance is fatal, Lord *Raymond*, 1376. Conviction upon swearing, 6 & 7 King *W.* quashed, because said that a witness *præstitit sacramentum*, and not *præstat*.

Lord *Mansfield*—This is a very nice objection; because when the man has taken his oath, though it be supposed taken down at the instant, it must be *præstitit*.*

Rejoinder—That it is sufficient if it appears that the persons empowered by the act are the persons treating and applying.

This is not an authority vested as a judicial or legislative power; but it is a capacity given and vested in the constituent parts, (which for this purpose are the mayor, aldermen, and common council) in order to enlarge their powers of purchasing lands.

Now if there is an authority to *A.* to purchase the lands of *B.* his treating with *B.* is a sufficient proof of his pursuance of the authority.

The city of *London* could not be a purchaser, under other description than as mayor, aldermen, and common council, or commonalty.

Now if the name commonalty goes farther than common council, and includes others as well as themselves, this surplussage will not certainly vitiate, if it be proved the parties empowered have all concurred in the contract.

That mortgagee, in or out of possession, is within the words "estate or interest;" and if you must tender the whole mortgage money, (which was contended) you may be obliged to tender 20,000*l.* for a purchase of the value of 10*l.* That as to this the provision is optional in the corporation, and either way compulsory on the party.

As to the objection of *præstitit*, instead of *præstat*, it may have its place; but in things which are done after some other, it cannot be improper to use a tense expressive of their being so after done.

Lord *Mansfield*—In this case the *præteritum*, in propriety of language, necessarily implies the present.

Mr. *Dunning* was very large on the absurdity of supposing the act to mean the corporation must purchase all to come at some; the public accommodation be delayed or defeated, if they do not take great estates upon their hands to obtain a trifle; and a number of unnecessary houses be bought, to come at a few that they do want.

* This seems to be the proper use of the *præteritum perfectum*; which some therefore, I think, have not improperly called the *præteritum præsens*, as standing on an indivisible point between the past and the present.

As to the objection to the tense, that perhaps there never was a time when false grammar was required; but there were times in which the distinction between false and true grammar was not so well understood as at present: And there were always times in which people took notes without knowing what they took, or understanding what they heard; and thus converted into nonsense that which is, to those who hear and understand, extremely good sense. Nor did grammar, if it was false, ever make void a deed or record.* Nor was all the nicety of special pleading required in persons who did not undertake nor pretend, nor ought to be obliged, to understand those dangerous and mischievous subtleties.

As to the objection to the description, it amounts to no more than only too many applied—you have all applied: A few of that all would have done; a part would have done; but the whole cannot. Besides, the objection was not made at the quarter sessions, when competent to have been made; if there was any thing in it.

Serjeant *Glynn* was against the order, Mr. *Bearcroft* and Mr. *Dunning* in support of it.

Lord *Mansfield*—What was meant to be gained, supposing the party complaining should succeed?

The answer was, the great inconvenience of the diminution of the value of the lands remaining, whereas the jury determined only on the value of so many square feet of ground. This was objected, as a considerable defect in the valuation.

[442] Lord *Mansfield*—I wish you could have proceeded to settle it some other way; for it may be very troublesome to them though we should happen to be for them, and they prevail in point of form; (unless, indeed, we should think that there is no power to force the mortgagee to sell the land) but what if we conceive there was a way, and a power of coming at the lands, and that they had been only irregular in point of form?

Terms were proposed by Mr. *Bearcroft*.

Mr. *Cox* said, he hoped he should render a reference unnecessary, by shewing the plainness of the case, in which he had more information than the other gentlemen.

The commissioners are to be treated with; the mayor, aldermen, and commonalty, in common council assembled, are the commissioners to treat; but when the conveyance is

to

to be made, this is to be done by the city in general, “ the mayor, commonalty, and citizens ;” otherwise they would soon petition against the act, if they were to be called on whenever a conveyance was to be made.

As to mortgagee, it supposes a case where the mortgage may cover the whole premises ; therefore if there is a mortgagee not in possession, the object is, that the city may come into the title without the trouble of a foreclosure in Chancery.

Mr. *Alleyne*—Without going out of the record, the application is to be made in the very stile stated in the record.

The court said, however, that whatever there might be in the record, there was not a word in the order. *Sed v. infra.*

Lord *Mansfield*—I was very anxious to have it settled in an amicable manner ; for the victory will be very hurtful to the party : And if the jury are to assess in a litigious manner, they will set a loose value on the lands.

Mr. *Dunning* objected to the proposal of purchasing the whole term ; but said that there could be no objection, he thought, on the part of the city, to make an enquiry.

Lord *Mansfield*—I had inclined to a reference. This is a special authority given by an act of parliament, to make a man part with his lands against his will, and must therefore be strictly pursued : And it must appear on the face of the proceedings that it has been so pursued.

Powers derogatory to private property, tho' by act of one's own representation.

tives, to be very strictly construed, and not enlarged by intendment. *Quod nota.*

The first objection is, that the mayor, aldermen, and commonalty, are not the persons empowered, but the mayor, citizens, and commonalty, which are two distinct things ; one a secular body, for * particular purposes, the other a corporation at large. Can we look into the constitution of *London*, and say, that the mayor, citizens, and commonalty have no authority ; or that it is made by the mayor, aldermen, and commonalty, in common council assembled, when upon the face of the record it appears otherwise ?

That the variance of stile is material and cannot be cured by evidence of the constitution of the city, or by conjecture.

There is another objection, which has not been taken notice of, which is, that it does not appear that *Crote*, the mortgagee out of possession, had notice. They state, indeed, that he had due notice ; but there are several specific circumstances required by the act, which ought to have been stated, in pursuance of a special authority.

[*443]

Acts under a special authority should be specially set forth.

Now as to the merits—(for the others are objections against the form)—Now *Croke*, it seems, is tenant out of possession, for a two or four year's term, I think, remaining.

The mortgagee is not compellable to account with the mortgagor, and there is a great difference, as to affecting the interests of the term. Then what says the act? The mortgagee out of possession might sign to any body; he shall sign to the persons empowered. Yes; but under certain regulations.

Mortgagee and mortgagor ought both to be made parties, when their respective interests are concerned.

I desire to be understood as not deciding that the city may not proceed against mortgagee and mortgagor, for their respective interests. With mortgagee, as for an apportionment of the term estate; with mortgagor for the reversion; but then they must both be parties: And they don't come in under particular provisions, but the general words.

Mr. Justice *Aston* said, that in this case the appearance of the mortgagor would not cure.

He concurred with Lord *Mansfield*, in saying that the judgment was very unsatisfactory, in saying the money should be paid to *Croke*, or some other person interested; whereas the act of parliament leaves nothing at large, but puts them to an award; and calls in all the parties interested, in order to have the value fairly and clearly assessed.

Wright *against* Holford.

Case out of Chancery for Certificate.

THIS arose upon a clause in the will of Mrs. *Holford*, wife of *Peter Holford*, made by virtue of powers reserved to her under the settlement.

[444] The devise was, all her moieties to her husband, for life, without impeachment of waste; limitation of a term of 500 years, as provision for younger sons; then limitation in tail male to the elder son, with remainder to the use of all and every the daughter and daughters of her by her husband, the aforesaid *Peter Holford*, to be begotten, and to the heirs of her and their bodies, lawfully begotten; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; remainder to her own right heirs, in fee. She died without revoking her will, leaving a son by him, and two daughters, *Constantia* and *Maria*, and a son by a former husband, who was the plaintiff. And question,

tion, whether the plaintiff, as heir at law, became intitled, upon the death of *Constantia* without issue, under the disposition of the will: or whether the share went to the other sister, by survivorship?

On the side of the heir at law—I shall lay this down as a principle in law, as old as *H. 7.* and down to the present times, that the heir at law is not to be disinherited but by express devise, or necessarily implied, and that probable conjecture will not do. I shall cite *Gardiner* and *Sheldon*, and *Williams* and *Brown*, which, I think, are precisely the same with this, and have only a colour of distinction at best, and that a very slight one. I shall take notice of the case of *Holmes*, and shall make a few cursory observations on the long string of cases which have arisen.

Certainty is the grand object of the law, on the construction of a will, as it is most highly expedient that dispositions of estates should be preserved. How is this to be attained, but by the principle I have insisted on? If the heir be disinherited by any thing less, instead of a certain devise, (or what I take to be the same, a necessary implication) if any the strongest probability be admitted to supply this, uncertainty and conjecture will be introduced; whereas no obscurity can be, if necessary implication be required: For necessity is an extreme, and all extremes are very easily defined.

Lord *Mansfield* said, no one doubted the case of *Gardiner* and *Sheldon*; they only explained the meaning of necessary implication. Lord *Hardwicke*, in the case of *Corrington* and *Hellier*, never doubted the case of *Gardiner* and *Sheldon*, but only shewed what a necessary implication was. There a man had made an estate to *A.* for ninety-nine years, with the subsequent limitations over. No man can say it was necessary he should mean to say, “if he so long live.” He might have given a man an estate for ninety-nine years; but under all the circumstances, the court judged the intent to be certain, or necessarily implied. A necessary implication is, where the intent upon the whole is clear, so as to satisfy the conscience of the court, and that no reasonable man who [445] hears it can doubt, and must be upon the will itself, and not from any thing out of the will.

Serjeant *Hill* proceeded with the case of *Cumber* and *Hill*, *ft.* 64.

Williams and *Brown*.

There is not only a want of necessary implication, but the cross remainder, supposing it well and sufficiently conveyed

by the expressions, and not too uncertain and indefinite to take effect, cannot here be supported, because bad in law in its origin, even admitting the testatrix had intended cross remainders, and well and sufficiently expressed her intention, according to law: For in this case it being to daughter or daughters, lawfully to be begotten, there might have been more than two, and no cross remainder should be between more than two, and therefore thus the support would be not good of the cross remainders contended for; which, if they could be proved to have been intended, must be proved in such a manner as, it is humbly submitted to your Lordship, will not agree with law.

The words are almost the same as in *Cumber* and *Hill*; and what has been observed of cross remainders, as a reason of their being so restrained and circumscribed as I am contending before your Lordship they have been, by ancient and successive adjudications, is, that they create great confusion.

How far this reason holds, or what other, it is not my business to insist on. However, it is enough for me if I prove, that in fact a rule of law, settled by decisions, there is now standing, which, whether for the reason hinted to above, or for whatever other, will not allow cross remainders but by necessary implication; nor between more than two. And a devise must be good in its original creation, or it cannot be established by subsequent event. If this be admitted, then in the case before us, the husband being living at the making of the will, there might have been more than two. But if there be a difference, it must arise on the word respective; which is superfluous: For it must be understood where the persons are of the same sex. And *Baron* very ingeniously, as he does every thing, explains the maxim, *expressio eorum quæ tacite insunt nihil operatur*.

Maxim.

[The case of *Cumber* was cited from the bench, which was to his grandson, *Hendon*, and his granddaughter, and the heirs of their bodies respectively.]

Serjeant *Hill* continued—In the case of *Doe*, on the demise of *Burville*, against *Burville*, if the implication had not been raised, the estate would have gone from and not to the heir at law: And this is consonant to the principles I set out with, and so *Holmes* and *Meynell*.

[446]

Ejectment—"I devise all my lands in *A.* to my two daughters, *E.* and *A. M.* and the heirs of their body, equally to be divided among them. And if they die without issue,

" sue,

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“ sue, then all to my nephew, *F. M.* with divers remainders over.”

This, being the case of a testator, should be governed by intention, as in 13 *H.* 7. a devise to a son and heir, after the death of his wife, makes an estate to the wife, for her life. This is proof of what intention he was speaking of not being a probable conjecture, but necessary implication, in the strictest sense; an estate to the heir, after the death of the wife: He was not then to have it before; nor was any third person to take; and therefore the wife must: And the disposition was such in that case, it was said, as prudence and reason would justify.—And what was the case? It was in favour of the posterity of the testator, who could not otherwise take but by such implication, and the whole was intended, and altogether. And the word all, he said, shewed plainly the whole was intended to pass together.

Dyer, 330.

Cro. Ja. 365. *Gilbert and Witten.*

The case Lord Chief Justice *Pemberton* denied is, where there was an express cross remainder limited, and therefore cannot be law.

Lord *Hardwicke*, 1 *Atkins*, 215. Devise to two daughters, and the heirs of their bodies; and, for default of such issue, remainder over: That this was to be understood respective issue. If the word had been, “ If they die without issue heirs of their or either of their bodies,” this I admit, in any case, would create a cross remainder. But here the words are “ All and every the daughter and daughters of the body of the said *Peter Holford*, on the body of me, *Constantia Holford*, begotten.”

No more than a devise to the daughters, and the heirs of their body or bodies, to take as tenants in common, if more than one. This is no more than to the heirs of their bodies; and, on failure of issue of any one of them, then the share goes to the heir. But it is said if there had been one only, she should have taken all: Why if more should not the shares go by survivorship?

I answer—The intent is not so strong as to be necessary; and if I can find any distinction between the one case and the other, I conceive it to be sufficient to keep the estate in the heir at law. Now portions to daughters are generally given to them as advancement in marriage; accruer of share by survivorship might come too late to be of use in that respect; and it is only probable conjecture therefore to say that she meant such share should accrue, rather than descend to

the

the heir. Therefore it was I grounded myself on this principle at first that certain intent, not probable conjecture, was necessary in disherison of the heir.

Mr. *Hardgrave* on the other side—I submit the same reason, which induced her to prefer the issue male to the issue of her former husband, would also induce to prefer the issue female to the heir at law. The limitation to the daughters is still more material, for it is to all and every my daughter and daughters; therefore if there had been one daughter only born, she would have been preferred to the heir. Now what difference can be effectually taken to shew that the heir was meant to be preferred to the rest of the daughters, if more than one upon the death of one; who was not preferred to that one if there had been one only: Then the limitation over to the heir at law is this—“and for default of “such issue” what issue is this? It refers to the precedent words “all and every” for the daughters should take in remainder before the heir, who was not to take until after a failure as full as could be expressed.

Dyer 303. Cross remainder between more than two and against the heir,

4 *Leon*. Where the court adjudged in a manner which shews that in ancient times, where a more rigid interpretation of wills was held than has been for a long time past, implicative constructions were admitted to raise cross remainders, where reason supported them. The next case I shall cite is *Holmes and Meynell—Raymond—Skinner—Sir Thomas Jones—and Pollexf.*

I should not have relied on the word “all” so strongly, if it had not been relied on in a determined case, *Spelman and Stonor*, 9 May, 1768.

The words of Lord *Camden* are, “this case is very clear “on the words each and every, independent of the authorities; and is much stronger than the case of *Wright* and “*Cadogan*,* in which I grounded my opinion on *Truesdale* “and *Best*.”—And I trust I shall shew this was the very case which was the ground with the house.

Lord *Mansfield*—You must not go to that, for that [meaning the supposing decision in the House of Lords] would prevent our sending the case back. I don’t think in fact it was determined, for the judges were not called in, I was up—and staid a little, and then went out—but be it as it will,

* The case which is before the court now of *Wright* and *Holford*, as I understand, only the names differing.

will, we must take it for granted it was not determined there, for the court of chancery can't send a case precisely the same which has been already determined in the House of Lords.

Mr. *Hargrave* continued—I shall only beg leave to say, that Lord *Northington* determined for us.

Lord *Mansfield*—You don't mean on the appeal. This was explained, and at last it appeared Lord *Northington* was admitted to have thrown out an opinion in their favour, and Mr. *Hargrave* proceeded to observe, that he had stated Mr. *Yorke* in his argument, as holding it too clear to be argued.

In the case where they refused to imply a cross remainder; this was, because it was to have arisen upon a contingency which never happened the devisee dying before sixteen, this is the case in *Dyer*. Two reasons are given in the case of *Gilbert and Witten*, against cross remainders, one that the devise being to the two sons by express limitation, there should be no cross remainders by implication; second, not between more than two, but this case has been since determined on contrary reasons; and it is not doubted that a man may create cross remainders between more; by express words. The only question is therefore, whether he satisfies the court upon the circumstances of his intent. In *Cumberbach*, the word “respectively” was used, which certainly seemed to imply the limitation over to take effect in failure of respective issue, which must mean exclusive of cross remainders; and the word “all” was not there. The case of *W. and Brown* was stronger, for the word “all” was in the will, but there was also the word “respectively;” and though it was said the court did not determine in the case of *W. and Brown* upon that word, yet in *Davenport*, it is admitted they did.

I apprehend that the preceding devises to the sons are not a very different thing from the devises to the daughters; every family has a greater regard to sons—and it rather turns the other way—the meant it to descend entire to the sons; but not so to the daughters—and I apprehend what is observed by way of interpretation stands in its full force.

1 *Leon. 14.* Devise to the sons, and if they died without issue, remainder—there was what Lord *Pemberton* calls in the case of *Holmes and Meyneil* a presumption of nature, that he would not disinherit his issue in favour of a stranger; the case of *Holmes and Meynell*, it was said, was not so strong, there were only the words “they and all.” I contend,

contend, there was also in that case the same presumption of nature which I hope will always prevail, over an intent in the least degree doubtful, expressed in disinheriton of the heir.

[449] [It was objected, that if it was once determined in the court of Chancery, this would bar a case being made.

Lord *Mansfield*—Not at all, when they come for farther directions than what appear on the decree.]

It was said, and I don't deny it, other parts of the will may be looked into to explain—this I don't deny; and I hope it will be so; there is a limitation with respect to the younger children, that if any of the younger children die unmarried and under age, that then the share or portion shall go to the survivor; and if all, then the share to go to the inheritance. This insisted for, inferring a like intention here (which was the use made) would, I think, rather imply that if there had been a like intention, the maker of the will knew how to limit a cross remainder in express words, had done it, and therefore would have done it. The maker of the will in that clause relating to younger children, was not satisfied with implying cross remainders in default of issue; but took care it should pass by the proper way of express limitation. There appears a predilection I deny not; but we are not to look into this appearance, nor the grounds of this predilection, but rely on the clear and certain title of the heir not to be defeated, unless by clearness and certainty against it. We rely on an old distinction not admitting cross remainders, where they might have arisen between more than two. I shall content myself with saying, that all the cases cited differed materially as to the circumstances, the heir would have been disinherited in some of them, if the cross remainders had not been implied; in an other it would have gone in disinheriton of the testator's remaining children respectively.

Lord *Mansfield*—Let it stand over.

Does not Lord *Hardwicke* rely greatly on the use of the word “respectively” in the case of *Comber* and *Hill*, and *Williams* and *Brown*? And the word “respectively” disjoins the inheritance; and this is very near as strong as the word which you admit would imply a cross-remainder. To this it was again insisted, that superfluous words, which must have been implied if not expressed, could make no alteration.

Lord

Lord *Mansfield*—In construction of intent it certainly would,* as where it is in default of such issue the whole to go over, this would have been implied if not expressed; and yet the want of such words appearing in the will, would make a great difference in argument of intent. [It seems where the word “whole” was used in *Holmes* and *Meynell* with the word “all,” nothing would pass until the whole could go over; and in the mean while the daughters on failure of issue would take by survivorship respectively.] But if these words were absent, the implication would amount to no more [450] (unless upon other special circumstances) than that the whole would be to go over finally but by parcels; that on failure of the respective issue, the share would descend to the inheritance.

The case came on for judgment the last day of the term, and Lord *Mansfield* delivered the judgment of the court to this effect.

May 21, 1774.

I found it the custom to say nothing upon cases which came for certificate; nor to declare any reasons upon the certificate.—True the bar might come at the opinion when it came on in chancery; but I think the custom was wrong. The two cases before us stand for our opinion upon certificate, and we shall state as follows.

The case of *Wright* and *Holford*, articles of agreement upon marriage of *Constantia*, then the widow of *John Wright*, she was impowered to make a disposition by a deed with two witnesses, or a will with three witnesses, of any estate which should come to her during coverture, or by descent to her husband, or any remainders or reversions under the settlement, which should arise. She became entitled as coheir by the death of her brother to an undivided moiety which he gives in trust to her husband for life, without impeachment of waste, (then a term of five hundred years with estates tail to the sons of the marriage,) and then follows devise of the same estate to the use of all and every the daughter and daughters of me the said C. by P. *Holford* lawfully, &c. and the heirs of their body lawfully; such daughters if more than one, [to take as tenants in common and not as joint-tenants,] and for default of such issue to the heirs of

* P. W. 79—80. on the maxim, *Constructio eorum quæ tacite insunt nihil operatur*; and Bacon's maxims.

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of me *Constantia* for ever. She died without revoking her will, leaving a son and heir at law and two daughters.—One died at two years old, the other is unmarried and an infant. Question, therefore upon the death of the elder daughter an infant and without issue; whether the heir at law became entitled after the death of *P. Holford*? We shall not go into the cases which would be too long the last day of term; but we shall state the certificate in such words as will carry the reasons with them, and will manifest the distinction between this and the cases of *Cumber* and *Hill*, and *Williams* and *Brown* strongly relied on by Serjeant *Hill*.

The opinion we are of will be certified in these words—
“there are no words in the settlement of remainders or reversions to limit over the share of the two daughters, upon their dying without heirs of their bodies respectively; on the contrary the whole estate is expressly limited over upon the failure of all the daughters and all their issue.” (These words are emphatically put in to satisfy Mr. Serjeant *Hill*)
451] there is no limitation upon failure of daughters respectively, or of the heirs of their bodies respectively, but in as full words as can be, general and total failure of all and every the daughters, and all and every their issue.

We think they take CROSS REMAINDERS.

Warranty.

New trials unfavourable, especially where the person, on whose side the verdict is, will be affected with something of a criminal nature.

MOTION for a new trial on a verdict against evidence, upon an action of warranty, for an horse of the price of 17l.

Lord *Mansfield*—I would advise you to set down with your loss, rather than come for a new trial when the jury have determined for the seller. No ground for a new trial. Better it should be determined once for all right or wrong.

New Trial.

ON an action brought for mal-prosecution against an attorney, the jury had found for the defendant; the plaintiff moved to be let in to a new trial.

The court said, defendant was sufficiently tried once where the suit was criminal.*

Attachment.

* *Nemo bis discrimen ninibit pro eodem delicto.*

Attachment.

THE attachment goes of course for non-performance of an award; and in order to get rid of it, you must set aside the award.

Verdict.

IT seems where a special case has been reserved a new trial has been granted, without previously setting aside the former verdict.

Costs in Ejectment.

WHERE there is ejectment, and judgment against the defendant by default, there is no recovery of costs upon the judgment, because the defendant is only nominal. In this case you may bring an action in consequence of judgment to recover mesne profits, and costs of ejectment.

Goodright.

[452]

EJECTMENT.

Question on the Effect of a Residuary Clause.

TESTATOR seised in fee, made his will in 1753, with this clause—"in case my personal estate (which I have before devised to my wife) be not sufficient for payment of debts, then I devise my lands in *Aldercombe*, to trustees for payment of my debts; and if not sufficient, then the reversion of inheritance of my wife's jointure to be liable; all the rest and residue of my real and personal estate whatsoever and wheresoever to my dearly beloved wife." The wife proved the will, the personalty was sufficient to pay his debts.

Question: Whether he meant to comprize the estate devised to the trustees, and include it in the residuary clause? If he did, the wife will take; if not, the heir.

Contended, that he could not mean to give this estate to his wife; because he thought that it might not be sufficient

to

to pay debts, *Row's* case—"devise to *R. B.* if he pay all
" my debts and funeral expences for ever; and if he do
" not pay them, devise to *Mrs. E. F.* all the rest and resi-
" due not herein before bequeathed." Devise contended to
be executory; but as *B.* died before the testator the court
would not admit of that; and they said that *Mrs. E.* could
not take by the residuary clause.

The different words "not before devised" which were
in that case make no alteration, but are merely tautologous.
The residuary clause is here, as generally, mere matter of
course; there is a case where a man with words wide enough
to pass his whole interest not knowing of an interest he had,
it did not pass.

1 *P. W.* 302. *Coke* and *Oakley*. *A.* went to sea; his fa-
ther left during his absence certain leasehold estates to him;
he returning left his gold buttons, tobacco-box, and all other
things to his dear friend *Oakley*. Question, whether the
leasehold estates would pass? Trever held not, and that ex-
ecutor held as trustee.

Mr. Wilson—On the state of the question, that if any
thing the heir seemed to have the worst case, because the first
clause gave to the trustees, the other to the wife; and the
question (even if it were any thing) only between the wife
and trustees.

But take the whole it is thus. If devisee should take upon
failure of a contingency which never happened; now on the
plain intent I submit the devisee should not.

[453] *Row* was determined on the ground of a lapsed devise.
Wright and *Holt* was the ground. He devises expressly all
his lands in *E.* to *J. Carter*, and his heirs; and if he died
without heirs, then over. *Carter* died without issue, in the
life of the testator. The devise over can't take place, even
under the residuary clause, because the lands had been ex-
pressly devised.

2d *Vern.* 394. Devise to *J. S.* of 500l. if he were alive,
and should come from beyond sea; devise over void.

Bethel and *Hindden*. Lord Chancellor, 16 Nov. 1772.
Testator *H.* directed his lands to be sold, interest to the
wife for life, and to his three nephews, who should be liv-
ing at the death of the wife. They all died in the life-time
of the wife; the rest and residue was given to the wife.
Question, whether this would pass the interest of the lands
sold for money? Held it would not.

1 *Leon.* 251. Devise of lands in fee for erecting and
maintaining a free school, and all other his lands, to *T.*

[Lord

[Lord *Mansfield*—This must be a mistake; for all other his lands is an exprefs exception.]

26 *Raym.* 1324. Testator directed his debts to be paid immediately after his decease, and gave power to his wife to sell his lands for payment, (if need should be) and to pay legacies; and all rest and residue to his wife. Lord *Cowper* was of opinion, though a power given to the wife to sell, and fee passed, subject to payment of debts, that she took nothing. There can be no stronger implication, in case the personal estate should fail, he devises to trustees, in payment of debts, if the personal then answered as it did, he did not devise.

How great the absurdity, that if the personal had not been entirely sufficient, that then the surplus should be a resulting trust to the heir at law. Lord *Talbot* determined it should not; but 3d *W.* 61. the Lord Chancellor, and three assisting judges, thought otherwise. How strange, then, that, if the personalty is entirely sufficient, the whole real estate devised, as subsidiary to it, should pass to the wife.

Mr. *Cust*—That there was a strong distinction between the cases; because the devise to a man and his heirs is good, upon contingency; namely, if he survive the testator.

That as to so much of the case as lands to be turned into money, that very circumstance answered them; for then, under the name of residue void estates, estates after acquired would pass. [454]

In the case of *Sprig*, he devised his whole estate for payment of debts; there could be then no residue, unless out of that surplussage.

The case before the present Lord Chancellor was on a question whether by the word estate the wife took in fee, or for life; not whether she took or not.

That the case in *Forrester*, *Malabar* and *Malabar*, went upon the circumstances whether he meant the estate should be real or personal. It was declared there, by Lord *Talbot*, that it appearing on the will that he meant it should be sold at all events, and made personal, therefore the heir could not take, but devisee must. The devise was, "All the residue of my personal estate.

Lord

On one side it was observed, that the wife was legatee of lands purchased after the marriage, by way of farther provision: On the other side, that this was not (even in the idea of civilians) sufficient to let in the heir; because it is not *in officiosum testamentum*; for he gives legacy to the heir, *ex nomine*.

Lord *Mansfield*—The testator, *Humberton*, being seised in fee of the premises in question, and divers others in *Lincolnshire*, and elsewhere, after several precedent devises, legacies, and bequests, part of realty, devises thus:

“ In case my personal estate, exclusive of such part
“ therefore as I have before given and bequeathed to my
“ wife, shall not be sufficient to pay my debts, I give to
“ my brother,——, and my friend, ——, and their
“ heirs, in trust, to pay debts and legacies, and supply de-
“ fects in the personal estate.” And in case not sufficient,
then he devises the reversion of inheritance of his wife’s
jointure; and wishing and hoping his personal and real
estate in *A.* shall be sufficient to pay all pecuniary legacies,
and also particular legacies to his heirs, on condition of giv-
ing up their claim to lands under the uncle’s will; then
comes the residuary clause of rest and residue to his dearly
beloved wife. This action is brought by a coheir for a
moiety.

There are two ways of considering the question; first,
whether this residue does not take in the lands, as not de-
vised. Now the lands are devised upon a contingency which
never happened. This is, it seems, as if there had been
no such limitation at all. Now the devise is only in case
personalty should not be sufficient, which it was.

But suppose, on the other hand, there had been a small
part necessarily to be paid, and accordingly paid out of the
lands—as to this, there would have been a resulting trust
to some body. As for Mr. *Cist*’s objection in point of form,
[455] it has been often over-ruled: No man shall be nonsuited
on account of an estate in his own trustee.

Now under the will, if the heir were to have the trust
resulting, the trust is only a part of his title. Now what is
this? It is only a trust estate, and in equity nothing more
than to raise money by selling, or mortgaging for payment;
then after payment it carries the whole surplusage; so
that either, as was the fact, there being sufficient from
the personal, or if there had not been quite sufficient, the
widow was entitled; and the rest and residue carries every
thing but what was necessary for the payment of debts.

POSTEA for the DEFENDANT.

Stainham against Bell.

Limitation
upon con-
tingency
of failure of

THE case was thus: Devise to a son, of which he
supposed his wife enscint, of his whole estate, with
certain

certain limitations if it should be a daughter. And on failure of issue of such son in tail, or daughter dying under age, remainder to his wife, the wife shall take, though no after-born son or daughter ever came into being.

Peere Williams, 390. Devise to son in tail; if son should die without issue, then to *A.* his wife; then to *M. S.* in tail; then remainder for life to the plaintiff. *A.* dying in the life of the son, upon failure of that contingency, the remainder over is void.

That the case before the court is distinguishable from *Jones and Westcombe*.

The devise in the principal case was, "Whereas my wife is now pregnant, if she bring forth a son, I desire he may have my estate when he comes to twenty-one years, paying certain annuities: But if she has a daughter, a moiety to my wife; the other moiety to my two other daughters, share and share alike. If either of them die before twenty-one, then survivorship to the daughter; but if both die without issue before twenty-one, then the whole to my wife." The case in fact was that no son was born, nor any daughter.

Question, Whether the wife should take?

Moore, 486, 487. Covenant to levy a fine; remainder to the first, second, third, and fourth son; and if it fortune the fourth son die without heirs of his body, then the estate to *H.* He never had more than one son. Limitation over, the court was of opinion, was good; and the words not conditional but merely limitation.

3d *Lev.* 105. [qu.] Upon special verdict, this case, that *A.* was seised in fee, and had four sons, devise to his wife; but if she marry, then that the first son, *H.* enter; like remainder to the other sons. She never did marry. Question, Whether the entail could take place?

2d *Str.* 1092. *Andrews v. Fulham*; where *Gulliver v. Wickes* is cited; and *Jones and Westcombe*, *White and Barber*, argued before this court.

Therefore if there was but one daughter, he could not mean that one should take more than two, and the wife nothing: And it appears that if the daughters both failed, the mother was to take the whole; therefore, on general failure of issue, the mother was to take.

Lord *Mansfield* asked, whether there were not many of the modern cases which came nearer than *White and Barber*?

Mr. *Davenport* alluded to one argued by Mr. *Heath* and Serjeant *Glynn*.

supposed future issue, that issue never comes into being, the limitations over as good as if the contingency had happened of such issue being born and failing.

Lord *Mansfield*—I only ask the question, whether there was any difference, except that there was not a fee, but the lands descended to the heir in the mean while?

Yes, my Lord; and perhaps because the wife might take as executrix.

Lord *Mansfield*—It is remarkable, this was very finely argued by the two Roman orators, *Crassus* and *Scævola*, in ancient Rome, on the will of *Coponius*; and that the case was admirably argued, so long ago, upon the intent and strict letter, mutually contended for and opposed.

Mr. Justice *Willes*—If two daughters, he gives a moiety to the wife; *a fortiori* if but one.

15 May 1774, last day of Easter term.

Lord *Mansfield* having first introduced, in the manner above reported, the case of *Wright* and *Holford*, proceeded to judgment upon this case, which he pronounced in the following terms nearly:

The next is a new one in its form—*W. S.* seised of the premises, made will. “ And whereas my loving wife is
[457] “ now pregnant, if she brings forth a son, I desire he may
“ inherit my estate, paying to my wife 4l. a year; paying
“ 30l. to one daughter, and 10l. to the other. If she
“ should bring forth a daughter, a moiety to my wife, and
“ a moiety to my daughters, when they come to the age of
“ twenty-one. And if they die under age, and without
“ issue, the survivor to take the share: And if they all die un-
“ der age, and without issue, the whole to my wife; and if
“ my wife die before my daughters, and they die without
“ issue, then I give the whole to my heir at law.”

The testator's wife was not enfeint at the time of making his will, or death; the daughters died without issue, under age; the mother married the Defendant, *B.* and died.

This is different from the famous case of *Jones* and *Westcombe*; the estate will descend to the heir at law till the contingency—and they are all executory devises—and if a son had been born, and lived to age, none of them would have taken place. But we shall not go into reasons, or distinguish the cases, but simply state our opinion.

We think it was the plain intention of the testator, in case no son should be born, and he should have no daughters who should live to the age of twenty-one years, that the wife should have the whole estate. Therefore we think, on the event that has happened, that she ought to have the whole estate.

The case of *Coponius* was 660 of Rome, 1834 years ago, and was declared by Lord *Mansfield* to be the ground of

Jones

Jones and Westcombe. Vide *Cartou Hist. Romaine*, vol. 14. and *Cic. de Oratore*, and in several other of his works.

Deed.

ACTION of debt upon bond, with a certain day. Plea. Agreement that the bond stood only as an indemnity, and that the plaintiff was not damned, and judgment of the court, whether he ought to recover. On this they join issue in demurrer at law.

And the question before the court was in effect, whether parol evidence could be admitted to prove a condition, where the conveyance was absolute, without fraud, upon the face of the record?

On the part of the plaintiff, it was contended that no parol evidence could be admitted, to vary and change the nature of the special obligation expressed on the deed.

To prove this, he first observed that not even on a will [458] can parol evidence be brought to make good a devise, except where all appears clear on the face of the will; and the uncertainty is extrinsic, and arising out of evidence. And that therefore, though in the case of *Malabar*, Lord *Talbot* suffered evidence to be paid, that the testator meant such a person should take as devisee, and not a person as described by the will, the next day he said he had been wrong in admitting that evidence; but thought there was enough to determine on the will.

There is an excellent distinction, with the usual ingenuity of the author, laid down in *Bacon*, upon the difference between an apparent uncertainty on the face of the instrument, and a latent uncertainty, resulting from external evidence. He says a secret uncertainty of words not apparent on the face of the instrument is cured by averment, for that ambiguity which springs from matter of fact is removed by averment of the fact: * But an ambiguity apparent on the face of the instrument is never holpen by averment. And the reason is, (as he very excellently adds) because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments; and so in effect, that to

Law tracts
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ims.

K k

pass

* *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*

Ambiguitas verborum patens nullâ verificatione suppletur.

pass without deed which the law appointeth shall not pass but by deed.

Therefore, if a man give land to *J. D.* and *J. S. et heredibus*, (without saying whether of their heirs) it shall not be supplied by averment to whether of them the intention was. And he adds (after another instance of the case of perpetuities) infinite cases might be put; for it holdeth generally, that all ambiguity of words, by matter within the deed, shall be holpen by construction or election; (neither can apply to this case) but never by averment.

And there is a case in *Croke* very like the present; only it was not there attempted to go so far. They wanted to vary the effect of the deed as to circumstance; not to defeat it in substance, and take away its operation entirely. The case was, *Cro. Eliz.* 697. *Hayford v. Andrews*, debt on obligation; condition to pay the money at a certain time; agreement pleaded to pay at a future day; plea bad. 1 *H.* 7. Brian Justice. That it never was known, from the beginning of the world, that a man might aver against a specialty by matters diverse, where the deed had a legal commencement.

[459] In 8 *Co.* *Altham's* case, *A.* levies a fine to *William*, his son—Upon this the judge can't make question for any matter of law; but now the party comes, and avers matter of fact, that *A.* had two sons named *William*, an elder and a younger, and his intent was to levy the fine to the younger: This averment out of the fine is good of this matter of fact, which stands well with the words of the fine, and shall be tried by the country.* But if a man by deed gives to one of the sons of *J. S.* who has divers sons, here he shall not aver which son he intended. And a little lower he cites the case cited by *Bacon*, and authorities from the year-books; and adds, no averment can make that good which, upon consideration of the deed, is apparent to be void.

Case of *Andrew—Fitz-Gibbons—Bond—Plea* against it, that it was for composition of felony. And the Lord Chief Justice held the plea good; but it was because this went to the destruction of the deed which never had a legal existence, & if it were true, and was not a collateral plea, which did not go to the destruction of the deed itself.

Alfon

* Ad questionem facti non respondent iudices sed juratores.
Ad questionem legis non respondent juratores sed iudices.
§ Idem est contra legem esse ac omnino non existere.

Easter Term, 14 Geo. 3. K. B.

Alfen and Mears, K. B. Hil. 1771. The Chief Justice is said to have declared, that there never was heard a case, he believed, in which parol evidence was admitted to annul or substantially alter a specialty.

Lord *Mansfield*—If the fact is true, it's a proceeding contrary to a solemn agreement upon a satisfaction; which the law will no more suffer, than to proceed on warrant of attorney after solemn agreement and satisfaction.

Make a motion to stay proceedings, reserving the demurrer: And if on what Mr. *Wilson* has argued very strongly, the court shall be of opinion you can't plead against terms of the bond, then you will consider if you cannot amend your plea, by coming in for satisfaction, or what is tantamount.

What cannot be maintained as a plea must not be given in evidence, [nor made use of on motion. ‡]

Rule proposed, upon condition of giving up the plea of *non est factum*, payment of costs, if against them, and judgment final upon demurrer, that the defendant may be at [466] liberty to amend his plea.

They not waiving their plea of *non est factum*, and it appearing to the court that the plea of agreement was false—

JUDGMENT for the PLAINTIFF.

But, for the sake of the bar, Lord *Mansfield* observed that the objection had been perfectly right to the collateral evidence. But if there had been merits, the court would have got at it another way.

Covenant to secure quiet Possession.

ON a question, whether covenant should extend to disturber by wrong, or under lawful title only. Covenant by mortgagee out of possession to indemnify against all losses, charges or expences, which covenantee might be put to by mortgagors, or any persons claiming under them. Assignees enter under a commission of bankruptcy against mortgagor, and withhold possession; breach assigned, that he has not peaceably and quietly held and enjoyed, nor can peaceably hold nor enjoy, according to the true intent, &c. for that certain persons entered, as assignees under the commission. The defendant replies, that he is mortgagee out of possession, and that, the entry complained of

K k 2

‡ Quod fieri vetatur ex directo vetatur etiam ab obliquo.

of was by certain persons claiming as assignees under *A.* and *B.* as being then bankrupts; whereupon demurrer.

Dyer, 28. was cited. Covenant to keep quiet the possession. Objected, that the disturbance was by wrong, and that therefore the plaintiff might have had trespass; but the court said, the agreement being generally to possession, and the principal cause of the covenant, that therefore the plaintiff should recover.

Lev. 298. It was said, that the possession, and not the title, was the subject of the contract. (So that the covenantor was to secure possession to the covenantee, whether disturbed by right or wrong.)

Hob. 34, 35.

In the principal case it was observed, that a mortgagee out of possession having no possession to pass, covenants for the possession, and title. That covenantee would have no benefit of his title, unless covenantor were liable: as he would not have legal possession, nor remedy against disturbers, with or without title.

[461] Objected on the other side, what can mortgagees warrant, but as far as their own title as mortgagees? They cannot maintain an ejectment: And the entry under the commission was lawful.

Lord *Mansfield*—Must it not be taken for granted, on this pleading that the disturbance is by wrong? They have pleaded it so; and you have demurred, and so admitted it, instead of joining issue.

Demurrer in law admits all facts in controversy between the parties in the point of demurrer.

Question asked from the bench—Is that commission in force?

Undoubtedly—was the answer.

Mr. Justice *Aspburst* observed, this plea was very odd, not averring they were then bankrupts, but saying, “claiming as assignees under *A.* and *B.* as being then bankrupts.”

Lord *Mansfield*—I think it's very clear the covenant does not contain trespass.

Judgment therefore for defendant on the first count.

There

Note, This inconvenience renders demurrers much less frequent; especially as their end is often attained in divers ways, as by special verdict, case reserved, arrest of judgment, bill of exceptions, &c. after the facts found.

Easter Term, 14 Geo. 3. K. B.

There was another count, for giving possession; on which judgment for the plaintiff, possession never having been conveyed,

Penalty on Bond.

DE B T is the substance; penalty is the form of recovering it. As soon as the court of Chancery had determined that the debt was only the money upon the bond, and this court had determined, since the statute of usury, that the penalty was not usury, it is astonishing there should be any difference. And an annuity is exactly in the same predicament; and the judgment stands as a security for the payment, yet by a great inconsistency, whereas notes carry interest on bankruptcy for forty years back; yet where there is a bond with penalty, they do not in the Exchequer; for [462] there they consider the penalty. Per Lord *Mansfield*.

Information.

ON an information against printers of a news-paper, for publishing a libel, reflecting on a justice of peace.

The author of the letter had complained at a sessions, at which the plaintiff sat a judge, "that he had not done him justice." The justice brought his action upon these words.

When this action was to be tried, a paragraph appeared in the paper, and stated this story, and the words spoken; stated a demand of general submission, and asking pardon of all the world. And then these words were added, "It's left at the assizes, to be determined whether these words, on the circumstances, were a reflection on his worship's honour, or no." This seemed to have been added by the printers. The circumstance urged as the greatest aggravation was, its coming out against the assizes.

On the part of the plaintiff—That he did not come prepared for his defence against insinuations of cruelty and oppression in his conduct, as not expecting that persons standing before the court, under such circumstances, would have turned accusers. However, that he did not prosecute out of vengeance, but with a public view, to deter men from such aspersions on magistrates, as would set them up as objects of public resentment, and discourage them from doing their duty.

It was farther urged for the plaintiff—That he had the verdict of the jury on his side; that he was a gentleman of fortune

fortune and reputation; that he did not proceed upon the indictment on account of a defect of formality, whereas, had he been vindictive, he might easily have easily pursued it farther.

That the paper complained of sets out with an attack which the plaintiff is accused of having made on that liberty and freedom of speech which every man in this country has right to enjoy.

That this paper "state of facts" says, that the defendant said to the prosecutor, in as modest terms as any gentleman could do, that he thought he had not done him justice; and concludes with leaving it, whether, under these circumstances, the defendant speaking the truth, was a reflection on his worship's dignity, or no.

It is said, it would be very hard to punish printers, who publish every thing they receive.

[463] [Lord *Mansfield*—You need not go on. I did not suffer that part of the affidavit to be read.]

That they did not know the authors. The counsel said—I hope no man now exists in this kingdom who does not know this to be no excuse. That they did not know the parties. I believe this is often the case: For if they did, the scandal thrown out on the highest, the most respected characters, would never have been cast upon them, even by the most wicked of the tribe. And it is no excuse that, be the character ever so innocent or honourable, they knew not but it might be so, and therefore aspersed it by a scandalous publication.

The plaintiff submits the mode and measure of the punishment to the justice of the court.

Lord *Mansfield*—There is a delicacy on the part of the prosecutor, in offering to accept any terms, if proposed to him; but from the court it would have a different appearance. I do not know whether it would not be best that they should pay the prosecutor the costs of the suit. The court would not have granted the information on a common trifling libel, This a reflection a magistrate, acting right or wrong, and it ends with leaving it to be determined at the ensuing assizes, whether this be a libel on his worship, or no. On this last clause we must grant the information; as it tends to prejudice the decision then depending. But I think the plaintiff does not come quite properly; as he first appeals to the tribunal of a public news-paper—A very improper one for a magistrate to appeal to.

Bolton *against* Smith.

In Arrest of Judgment.

ACTION for toll—four counts.

1st, That he is lord of the manor of G. in the county of L. and that he and all his ancestors have repaired; in consideration whereof they have time out of mind taken toll of all vessels unloading within the manor,

2d Count omits the consideration.

The two other counts were not particularly observed upon, [464] as it was admitted they could have no objection against them but what went against the two first.

And the objection was, first, that the consideration laid on the first count is insufficient in law.

2d, That having been laid, it ought to have been proved.

Lord *Mansfield*—How does it come?

Answer—By a rule to shew cause.

Lord *Mansfield*—Why, then they should shew cause,

3 *Lev.* 734. cited.

Lord *Mansfield*—What they quote from *Levinz* is not precedent; it is the identical case.

Another 2d *Lutwyche*, with the *dictum* of Lord Chief Justice *Treby*.

Lord *Mansfield*—Never mind that: The *dictum* will not do.

Another in Serjeant *Wilson's* Reports, 290. third of his present majesty: That this case goes farther, and the consideration is more extensive.

That upon the first count, declaration is sufficient to maintain the toll.

On the other side, Serjeant *Hill*—That the principles of Serjeant *Wilson's* case were still for him: That was a toll traverse, or for passing through. There a consideration must be laid; here it needs not, but, as they have laid it, they put themselves on the proof. I submit, by laying it they make it part of the prescription: And then I hope, upon the authority of the second case, that I may say consideration insufficient.

I beg leave to say, that toll is not now enjoyed; nor ever was, within memory.

Lord *Mansfield*—You cannot to that in arrest of judgment.

Lord

[465]

Lord *Treby*'s opinion quoted, that where consideration is not well alledged, still the plea may be good. The plea in that case was, *erga reparationem*; instead of alledging actual reparation. Now here actual reparation is alledged.

Serjeant *Hill* objected notwithstanding, that no body ought to be subject to the consideration but those who partake the benefit.

Lord *Mansfield*—Here it does; for you land either upon the wharf, or land within his manor.

The consideration is well alledged, of being bound to repair without actual reparation.

The third objection, that the second count was certainly bad, and that it was all one action: And in action upon the case for words, where one count was bad, though the first was good, the badness of the one vitiates the judgment entered upon it.

Lord *Mansfield*—It is admitted, that, after verdict, consideration will be presumed; either the same as laid, or a good one. The case in *Levinz* was about an hundred years ago: Put a marginal note, and it will serve an hundred years hence.

28 April. Serjeants called, *Grose* and *Adair*, esquires,

Roads.

UPON the act of parliament giving power to commissioners to continue private ways, it was questioned whether they were to repair themselves, or compel others to repair them.

Lord *Mansfield*—What, are they to continue them, and leave them to be impassable?

It is plain who were liable to repair before, shall be bound still. And those who were liable to repair in respect of tenure for the frontage of the tide roads, shall continue so.

Berkenshaw against Gilbert.

Revocation. Question.

ACTION of trespass. Case stated. Defendant justifies, as by authority under a will by testator, duly executed in 1759.

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On special verdict, case for the opinion of the court, on the following circumstances: That testator in 1759 made his will; duly executed, and published at the same day an exact

exact duplicate; the substance of the will is stated. And upon the parol it appears, and is stated, that testator said to a labouring man, one of the witnesses, that the will was made to make his wife easy. That he said to another, it was not a will to his liking; and he did it because he thought his wife was near her death, and wanted to make her easy. The duplicate is found to have been in the custody of his daughter.

That afterwards he sends for Mr. S. his attorney, tears off the seals, and orders the witnesses names to be cut out, which was accordingly done, and in his presence. That he made a new will in 1761, the same day, and gave it to a friend to keep; "for he would not have his heir at law find it." That he sent for his second will; and that he sent, being in his senses, to an attorney, to come and make him a new will; but was out of his senses before he came: That the second will was found cancelled after his death, and the first found cancelled after his decease, both in one paper; and the duplicate of the first found uncanceled in one of his drawers, after his decease.

Mr. *Morgan*—That the cancelling a duplicate was cancelling the original. 2d *W.* 346. *Onyons* and *Tyers*, and 2d *Vern.* the testator cancelled that will with great deliberation, which was in his possession; in our case the uncanceled part, it is found by the verdict, was in possession of the daughter, who claims against the heir at law.

This distinguishes our case, in the clearest manner, from the case cited; where the testator meant to cancel only on a mistaken supposition, and the devises were effectual as to the real estate, being substantially the same as to personal.

There appears no intention to republish, supposing the court would set up an implied publication. The last act of sense before his death was sending for an attorney, to make another will.

3d *Bur.* 1496. A will made by a joint-tenant during the continuance of the joint-tenure, is not good after the severance, though partition before his death, unless by express republication.

Lord *Hardwicke* said, that in a case where a will was declared void, unless the testator returned from Ireland, nothing could set it up, unless something done by the testator, after his return, made to defeat the condition. After the statute of frauds, therefore, by this having been once void and annulled, (not merely suspended, for this seems the distinction)

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distinction) nothing less than republication (which is, as it were, a making of it anew) could be sufficient. For it could not be once void, and good by after act, other than of remaking, or republishing. Therefore a will made by a *feme sole*, who afterwards marries, and survives her husband, is not good by event of his death, unless republished; because there was a time in which it could not have been good, and the power once merged could never revive of itself, but must be created again by some express act, purporting the intent of the party to use it as she had done before her death; by an act after, between the time she becomes capable to use it, and her death. The reason for the distinction of this case from a will only obstructed by a latter will is, because then neither are perfect till death, and it is every moment in the testator's election and power, during life, which shall stand and be his last will: But when he has once fixed his election, by saying, this shall not be his will, unless he does a certain thing, it cannot be so against his declared intent, till he shall have done that thing, or duly revoked that declaration made: And having once ceased to be his will at all, it cannot be his last will, unless he shall have taken some after notice of it, amounting legally to a declaration of its being such.

3 *Vern.* 741. by Lord Chancellor *Cowper*,

Party claims, as under the heir at law.

Parsons and *Freeman*, 1 *Wilson*. Determinations upon revocations of wills have always been favourable to the heir at law.

On the other side—That the jury have found a due legal will, according to the statute: That the will, thus executed, was found after the testator's death, in his room.

What has intention or implied revocation to do? The statute requires a cancelling or obliterating by testator himself. Is it destroyed by a second will? Nothing but a second will cancelled against it.

Glazier and *Glazier* determines the doctrine of *Ecclestone* and *Speke*, *Onyons* and *Tyers*, and the case in *Lev*.

Case 10 *G.* 3. the question, whether a subsequent cancelled will had the power of revoking a former subsistent will, your Lordship determined, the former will, when cancelled, was no will at all: But cancelling the second will, the testator also destroyed the revoking part; then the former will stands unimpeached.

Where both parts of the duplicate were in the testator's possession, there can be no reason to say, that a duplicate cancelled was an effectual cancelling of the original.

2 Ver. Preced.

Chancery Proceedings, 64. The case there determined was only that the cancelling the part in his own possession was no effectual cancelling of the will: And his cancelling was only on the supposition that he had made a second will at the time.

In this case, says *Peere Williams*, it was said by Justice [468] *Powis*, and not denied by any, that if a man had two wills in his possession, the cancelling one was no effectual cancelling of the other.

Now in *Cumberbach, Lambrey*, the testator sent for his will out of his escrutoire, and cancelled it; and it was held sufficient cancelling of the other duplicate, which he had not by him.

In *Viner* I find the same case, with a material difference from *Peere Williams*.

The Equity Cases abridged, 407. A man makes his will, and duplicate; he then makes a second will, not duly attested; he then cancelled the duplicate. Determined, that this was no substantive independent act, by which he meant to set aside the original will, so as to intend to die intestate: It was not intended that the second will should be barely a revocation of the first; but he intended it should be a form accompanying his making of the second will, which he meant should be a disposing one.

Lord *Mansfield*—There was a case, of *Mason*, I think, before the court of Delegates, that where a man made a will, (and disposing real and personal) and concluding, “ In “ witness whereof, &c.” and the testator had signed, but not the witnesses, this was a good will, as to his personalties; but they determined he did not mean it should be a will at all, unless it could operate as a general disposition of his property. Here is the strongest evidence he never meant to die intestate; he made a will and duplicate.

The counsel continued—*Swinburne*, p. 502. cites several methods of revocation; the two first relate to the civil law; the third does not hold since the statute of frauds; the fourth is of a contrary subsisting will; the fifth of revocation, notwithstanding derogatory clause; the sixth, that a will with a greater number of witnesses, may be revoked by a will with fewer; seventh relates to the civil law; eighth revocation good, notwithstanding oath not to revoke.

Lord *Hardwicke*, 3d Atk. 375. This court, upon revocations, must go upon the same rules as a court of law. A court of equity does not favour revocations against the plain intention of the testator.

Neale and Roberts, 3d Bur. 391. Constructive revocations contrary to the intent ought not to be admitted, and cases of that nature have brought a scandal on the law.

[469] Lord *Mansfield*—State the case of *Onyons and Tyers*. Did he not stop in the act of cancelling?

He had made a will in 1707; he made in 1711 a second will, with a clause of revocation: He called for his wife, to cancel the former will, and a witness swears he heard her tear it.

Mr. Justice *Aston*—That is another case. I suppose there was a former will subsistent.

Where testator had torn off seven seals of a will of eight, the eighth remaining; upon the attorney's desiring him to stop, for the other would not be good, he stopped: The second will was bad, the first uncanceled then took effect, the other being void.

Glazier and Glazier was tried before Lord Chief Baron *Parker*, who was of a different opinion. The ground was, he makes a first will; then he makes a second, which he afterwards cancels; and then, undoing what he had done, sets up the former will.

Mr. Justice *Aston*—There's a case in *Perkins*, directly in point.

Mr. *Morgan*—This was not the case of *Glazier and Glazier*, the duplicate not then being in the possession of testator, it does not signify that it was afterwards in his custody: He cancelled all he could.

The first will was not cancelled. 2d Equity Cases Abridged, 766. *Cummins*, 383. Lord *Cowper* said since the statute [of frauds] there can be no devise of lands by implied republication: For a paper in which a devise of lands is contained ought to be re-executed. Testator said to seven persons, "I send to you to be witnesses of my will; (and sometimes of the republication of my will)" and holding the will in one hand, and codicil in the other, he said, "This is my last will; and I direct my codicil to be taken as a part of my will." Witnesses subscribed the will and codicil, both lying on the table; and he declares in the codicil his intention not entirely to revoke the will before made. But Baron *Parker* thought an express republication necessary.

Submitted, that the original will or duplicate being cancelled, is the same as if the name of testator and witnesses had been cut off.

Nothing

Nothing could have republished but three witnesses of the republication, in the presence of the testator.

There is no evidence of testator's knowing there was an uncanceled will in his possession.

On the whole, the person has died intestate.

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Lord *Mansfield*—I don't believe we have any of us a doubt. There is no case in point, I think, to be got, and there needs none; the principles are very clear. *N. Newington* duly made and executed his will in 1759: It is not material to state the circumstances; I shall only say it is material to take notice it is not the same with that in 1761. And cancelling is an equivocal act, which, therefore, demands evidence, and admits evidence of this kind to explain it, *quo animo*. Witness, that it was made to make his wife easy. He told a man that it was not a will to his liking, and he made it to make his wife easy, as he thought her near her death; "but if he lived he would alter it." The wife died—He sent in 1761 for his old will, to alter it; he made another will the same day; and then tore off his name from the old will, and the seal, and desired Mr. *Samson*, his attorney to tear off the names of the witnesses, not contented with an express clause of revocation. He said, he destroyed the old will because he wanted to give a greater share to his granddaughter, *M. Inglis*; otherwise his daughter, Mrs. *Weston*, would have more than her share. That he gave the new will to *Samson*, and desired he would keep it as private as possible: (From a jealousy of his daughter.) And he said that Mrs. *Weston* had got the other part of his will in 1759.

Let us pause a moment, and put the question, whether the will of 1759 revoked? Now since the statute of frauds, a will cannot be revoked, (except by operation of law) unless by an instrument with the forms required by the statute; or by tearing, cancelling, and destroying. We observe, this tearing, cancelling, and destroying, is an equivocal act, and it is necessary to see *quo animo*, to make a revocation.

Supposing a man, meaning to throw sand on his will, throws ink; this is perfect obliterating, but not with an intention of cancelling.

If a man orders a friend to cancel his first will, instead whereof he cancels the second, this is no cancelling the second. In the case of *Onyens* and *Tyers*, it was a doubt, as to fact, whether he did cancel second. That could never mean to revoke the first; for all the material devises of lands were the same, and to the same person: He thought he

he had made a good and effectual will, according to the statute of frauds.

Lord *Cowper* said, if even the law held it revoked, yet, on the head of accident, a court of equity would relieve. This would be very difficult to maintain; but it shews the reasons on which they went; namely, of the intention: [471] For though the intention will not supply requisites of positive law, such as attestation of three witnesses, &c. yet, as to all the rest, the intention is to be shewn to prove revocation.

In order to shew intention to revoke (revocation being in itself an equivocal act) parol evidence must be let in.

He makes a will in 1759—at the desire, and to please his wife—He gives a greater share to *A. W.* than he thought she ought to take. This will is left in the hands of Mrs. *Weston*. He makes a duplicate, which he keeps. He makes in 1761 a legal good will, with a positive clause of revocation. Not content with revoking the will of 1759, (not only by making another, but by positive words) he also deliberately cancels the first. And it appears by his own declaration, that the counterpart of the will was in Mrs. *Weston*'s possession, and that he could not take it out of her hands, because he meant it to be kept secret, and expresses a fear, lest Mrs. *W.* or *A. N.* should come at it. And he clearly never meant the will of 1759 to be made use of, and he gives at the same time the will of 1761, to be kept safe. Let us stop here, and see whether the will of 1759 was now revoked. Certainly; and it could never be set up, but by a new instrument of republication. A devisee (the granddaughter, *Mary Inglefs*) died; and therefore he wants to cancel the will of 1761: He sends to make another, and for his old one of 1759, which he is very particular in desiring may be wrapt up in a piece of clean paper [sealed]. It must be between *August* 1761, and *December* 1762, the time of his death; it does not appear precisely when. The will of 1761 is sent him; the attorney comes in about an hour, upon the same day in which the will was sent for, but too late to receive directions for another will, the testator at that time being insensible.

If the question was made, whether the cancelling of the will of 1761 were a conditional revocation, it would be a very different question. It is remarkable too, mind this, that he wraps the two cancelled wills in the same piece of paper. On his death, the counterpart of the cancelled will of 1759 is found in his drawer, among his deeds, uncanceled.

telled. It must have come from *A. W.* but when, on what message? It may be it was sent for the day before his death, when he had not time to cancel. It is a very strong and plain case, without looking into the time when the other part of the will came into his possession; or whether at any time before his death.

POSTEA for the PLAINTIFF.

Harman *et al.* Assignees of Fordyce, against
Fisbar.

[472]

Action of Trover upon Notes.

CASE. Defendant, *Fisbar*, creditor of *Fordyce* and Company, gave credit farther for 7000*l.* which he borrowed for the support of the shop, and which was to be replaced in six days, being lent during the holidays.

Before the time fixed, and without demand, Mr. *Fordyce* sits up all night, delivers the letter to be sent to Mr. *Fisbar*, "To Mr. *Fisbar*," to this effect:

"Mr. *Fordyce*, conceiving that the sum lodged in his hands might be liable to dispute, has the honour of giving Mr. *Fisbar* that preference which he thinks he undoubtedly deserves, two notes inclosed, 5,500*l.* 1,500*l.*"

He gives the letter to his clerk, to deliver to Mr. *Fisbar*, and about an hour after goes off; after which commission issues the same day, and Mr. *Fisbar* receives the notes three days after, and refuses to return them, legally demanded.

Upon this it was argued for the plaintiff—That here, therefore, on the eve of a bankruptcy, he expressly declares a preference intended.

The notes are in Mr. *Fisbar*'s hands: And whether, on the circumstances of the case, the plaintiff is entitled to recover, is the question. Question.

Whether it was a compliment to Mr. *Fordyce*'s justice, on the eve of his bankruptcy, to give that preference, in contemplation of a bankruptcy, is not the point. This question has come before the court in a variety of instances, and I know none so strong, upon the circumstances, as the present, to determine such act void. Whether this is an act of bankruptcy, might be another question: But that it is such a preference as the laws will not allow, by the principles laid down by your Lordship, I beg leave to insist. Argument.
First, that such preference, in contemplation of bankruptcy, is void.

4 Bar.

Slader and DeMatto's. 4 Bur. 467. The case was, *James Davis*, an agent of *Dematto's*, knowing *Slader* to be indebted, and that he could not carry on his trade, unless somebody in *London*, as a banker, would pay his draughts, negotiated, in July [473] 1756, an agreement between the said *De Matto's* and *Slader*, that *De Matto's* should pay *Slader's* draughts, on having security.

The nature of the security, and terms of the agreement, appeared only by a deed of 23 October 1773, prepared and procured to be executed by the agents of *De Matto's*.

The deed recites *Slader's* title to the mill and premises; his being concerned in merchandize, and frequent occasions to draw, and remit to *London*; and his request that *De Matto's* would be his banker there. And, in order to indemnify him for so doing, *Slader* assigns over to *De Matto's* all his estate, and interest in the premises aforesaid; and also all his stock in the trade of brewing and making malt, and in the business of a corn-factor and miller. Then follows general assignment of debts, horses, &c. and all other goods and commodities belonging to the said several trades; with defeazance, however, on *Slader's* paying to *De Matto's* all the money he should advance on any note, draught, bill, or writing, of the said *Slader*, and his indemnifying *De Matto's* against the same, and all matters any way touching his agency.

Covenant on breach of failure of the conditions, that *De Matto's* may enter upon the premises, and take the stock absolutely to his own use.

8th October *Slader* drew on *De Matto's* for 200l. 23d, Another bill, both by authority of *De Matto's*. *De Matto's* knew *Slader's* affairs to be in a bad situation. *Davis*, *De Matto's* agent, represented *Slader* as a good man to his creditors, and concealed from them colourably the general assignment.

On the 11th of November, *Slader* told *Davis*, and another agent of *De Matto's*, that he could not stand, and consulted them what to do. The result of the consultation was, *Sills*, by order of *Slader*, the same day, gave possession to *De Matto's*, in the person of *Davis*, his agent, who immediately set out for *London*. Next day, the 12th, *Slader* ordered *Sills* to deny him; which *Sills* did on the 13th, and told the reason, that it was to commit an act of bankruptcy.

Slader

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Slader had nothing of value but what was comprized in the deed.

After the 13th of November *De Matto's* paid the two bills.

First question, whether *Slader* became a bankrupt?

The second and great question, in that cause, was, on what day *Slader* became a bankrupt?

The ground urged against him was, that the deed was fraudulent and colourable, and no possession altered. And that, if there had been a debt due, it was an undue preference within the act. [474]

For the defendant—That bankruptcy was a crime, and this not a crime, nor any bad use made of the deed. Your Lordship delivered the judgment of the court, of which I shall cite some parts, as particularly applicable to this case.

All the acts concerning bankrupts are to be taken together, as making one system of law.* They are all to be construed favourably for creditors, and to suppress fraud.

The law is to judge of fraud upon facts and intents.

The indemnity is a good and valuable consideration; and the deed valid, as between the parties.

But valid transactions between the parties may be fraudulent, by reason of covin, collusion, or confederacy, to injure a third person; so purchase, with notice to the prejudice of the first purchaser, who bought and did not complete his title; so marriage, brocage, bonds; so *Twynne's* case, 3 Co. even on a criminal prosecution, and the consideration undoubtedly sufficient and true.

Acts valid between the parties may be fraudulent and void against a third person.

Whether the deed then in question would be fraudulent in that sort, your Lordship said would depend on the purpose of it.

It was a false shew, by collusion to prejudice a third person.

The great objects of the bankrupt laws are, the management of his estate, and an equal distribution amongst the creditors: Both would be defeated by such a preference.

An equal distribution has been anxiously provided for ever since the 21 *Ja.* 1. c. 19.

It was thought mischievous to suffer priority to be gained by secret liens.

L 1

A case

* *Leges in pari materia conjunctim interpretandæ.*

Ea constructio verissima quæ malum supprimat et remedium operetur.

A case only of a conveyance, calculated to postpone one creditor to the rest, was held by Lord *Hardwicke* an act of bankruptcy.

[475]

A colourable exception of parts does not cover the fraud of the assignment.

A conveyance of a part may be public, fair, and honest; but a conveyance of all must either be fraudulent and kept secret, or produce an immediate act of bankruptcy.

It has been argued, that after a resolution taken by a trader to commit an act of bankruptcy, the trader so resolving may lawfully prefer a just creditor, by conveying part of his effects.

It is not necessary to determine that question in this cause; for here the conveyance is of all: And therefore I will only say, that no such proposition is yet established; much less in the extent whereto it has been urged.

In the case of *Cock and Goudfellow*, an immediate prospect of a certain bankruptcy was not the motive.

No deed can be fraudulent in Chancery which is not fraudulent in law. And if fraudulent, it is an act of bankruptcy, and this was the true decision of *Leigh's* case.

The distance between the deed (which was immediately put in execution) and the act of bankruptcy was, in that case, from eighth of *June* to eleventh of *February* following.

2 P. W.
427. T. M.
anno 1727.

Small and *Oudley* was a transaction beneficial to the creditors:

Linton and *Bartlet*. I have a copy of this case, by the late Mr. Serjeant *Lee*, who was counsel in the cause. One brother indebted to another 150*l*. he had an upper and a lower shop. In contemplation of bankruptcy, he assigns the goods in the one shop, of much less value than the extent of the debt, and absconds the next day. Whether this was a void contract, and an act of bankruptcy?

Lord Chief Justice *Wilmut* said, it was a subversion of the principle of all the bankrupt laws, which was equality. And he said, that though the judges, in *Worsley* and *De Mattos*, said the conveyance was of all, yet he knew, in his opinion, and that of the rest of the judges, that it would have made no difference in the case.

Offensible
possession
and a secret
lien would

A false credit upon a secret trust; if the assignment were otherwise good, would make it bad.

make an assignment void, though otherwise it might have been good.

The

The donor's continuing in possession, second argument in [476]
Twynne's case.

A trader is trusted upon his character, and visible commerce. That credit enables him to acquire wealth. If, by secret liens, a few might swallow up all, it would greatly damp that credit.

Every equivocal act may be explained by circumstances: And the use to which it is applied shews, *quo animo*, it was done.

On the whole, that the conveyance, though by way of security, and for a valuable consideration, is fraudulent, and an act of bankruptcy.

This is the substance, nearly, of what is reported of your Lordship's opinion. It is true it is said the determination there is upon the assignment of all; but, on a general view, let me endeavour to shew how it applies.

The argument that all the statutes of bankruptcy, as in *peri materia*, are to be taken together, is a general principle of law and reason, and applies as much to the case now as then before the court. The result from all, taken together, is there very truly laid down to be a construction favourable for creditors, and in suppression of fraud: It will not be favourable to the creditors that Mr. *Fisbar* should receive, and Mr. *Fordyce* be permitted to give 7000*l.* from the rest of the creditors; especially, which is the second point, when this is done in immediate certain contemplation of a bankruptcy, and when the very loan of this 7000*l.* had, in its nature and manifest consequences, a tendency to induce the other creditors to be at ease under a false security.

Judging of fraud, (I mean legal fraud, which, especially in bankrupt cases, means an act unwarranted by law, to the prejudice of a third person, and not that crafty villainy, or grossness of deceit, to which it is applied in common language) judging of it by facts and circumstances, there is here an act delusory, at least, in its natural effect on the creditors, prejudicial to them in an high degree, just and fair, indeed, as between the parties, if they only had been concerned, but not warranted by law; not that open, regular, public act, not that equal distribution which the law requires in favour of creditors, the security of commerce, public policy, justice, and safety.

The legal
notion of
fraud.

The goods (these two notes) were never out of Mr. *Fordyce's* hands till after he became a bankrupt; for the possession of his clerk was his own possession, and revocable [477]

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every moment : And by the act of bankruptcy, immediately following, in fact revoked.

That a secret conveyance, tho' of part, is an act of bankruptcy.

It is a secret transaction : And the reason given by your Lordship, in the case of *De Matto's*, why a conveyance of part may be not an act of bankruptcy is, because it may be public, fair, and honest. This is not public; and to permit it to take effect would be injurious to the creditors, to the spirit of the bankrupt laws, and to public credit and commerce.

That if fraudulent in equity it will in law, and therefore void against creditors.

Such an act would have been fraudulent in Chancery ; because secret, unwarranted, and against the law, and hurtful to honest creditors : It will therefore be fraudulent in law ; and being fraudulent, will be void, as against the creditors, with respect of whom it is fraudulent.

The act of bankruptcy immediate after sending the notes.

The distance here between the act of bankruptcy and the sending the notes (if the sending itself was not an act of bankruptcy) is the distance between one moment and the next.

That it does not appear on what consideration they come to Mr. Fishar, and before his acceptance determines the law takes them.

It was thought mischievous, ever since the 21 of *Ja.* to suffer priorities to be gained by secret liens. This might now be the consequence : And it is not expressed what these notes come in payment for ; and Mr. *Fishar* was not bound to accept them in payment for his 7000*l.* and before he could accept them (before they came into his hands, or he had knowledge about them) the law took them, and they are in the hands of the law.

But, as it may be said, that the case of *De Matto's* is not in point, notwithstanding the parity of reasoning, because that was an assignment of all, I will proceed to a case which was an assignment prompted by natural affection, the fairest consideration, and as just and favourable grounds as can well be supposed, in this or any case, and which yet was void, as against creditors, though an assignment of part only.

The case of *Linton* and *Bartlet*. I will shew what this case was, and how dangerous it is to rely upon cases, without attending to circumstances.

Case reserved last summer assizes ; *J. Linton*, trader in *Essex*.

The bankrupt, *J. Linton*, carried on the trade on his own account : The money lent to carry on the trade ; no interest paid upon it. He assigns the goods in one of his two shops to his brother, who had lent the money, and immediately absconded.

The opinion delivered was to this effect :

“ This is a very plain case. It is a hard case ; as all these [478]
 “ cases are upon particular creditors. Equality is the grand
 “ object of the bankrupt laws ; and partiality to be avoided.
 “ No man shall be permitted to put a fraud upon the court.
 “ If he may give a preference to one he may to more. This
 “ was an assignment of part of the effects. It has never
 “ been decided how much might be assigned without act of
 “ bankruptcy. The shutting up of one shop was giving as
 “ clear intimation of insolvency as if he had shut up both.
 “ The assignment was the ground of the judgment.

[Mr. Justice *Willes*—Was this determined an act of bankruptcy, or void conveyance.

To this it was answered, upon both. But Lord *Mansfield* observed, it could not affect the question here ; as it was impossible, to consider this as an act of bankruptcy. There was no doubt.]

The sending these notes not an act of bankruptcy

It may be asked, at what point, then, shall a trader be permitted to make this preference ? It is a question not easily admitting of a precise definitive answer. But, I think, one general principle or two may govern it, if rightly applied to particular cases. If we say from the act of bankruptcy, the cases do not agree with this, the end and spirit of the bankrupt laws does not agree with this ; and there may be a preference void, as against other creditors, where there is no bankruptcy. The cases, reason and policy, and general justice, will bear us out in saying, that from the time a man is become insolvent, so that he cannot prevent the bankruptcy attaching on him instantly, (though some happy accident, or providential intervention may) from that time he cannot give this preference, though for a valuable consideration, and though not yet a bankrupt. Nor, secondly, can he give it in contemplation of, and in actual intent to commit, an act of bankruptcy.

That a man actually insolvent, or 2d in contemplation of an act of bankruptcy cannot give preference.

Either of these, but particularly the first, apply to the case in *Temple and Alderton*. Though it cannot be an act of bankruptcy, unless there be a conveyance by deed, in the sense of the statute, as to this clause, yet the court could never set up the validity of such a transaction.

That tho' not a conveyance by deed, so as to be an act of bankruptcy, it may be void as against creditors.

I don't see the difference between Mr. *Fisbar* and any other creditor. He would not have trusted such a sum had he supposed the house in danger, and he trusted like another creditor. And when Mr. *Fordyce* had set up all night, declared his preference in his letter, absconded the next morning, surely, this conduct sufficiently explains how the act is to

to be understood, and what should be the consequence. He is gone before the letter is delivered, and before the usual office hour. If it should be admitted that such a preference might be given, the most opulent creditor, from whom services had been received, and future supplies and support of credit was expected, would always be paid off, and the poorer left to come in for their share under the bankruptcy.

I have no doubt your Lordship will be much urged by Mr. *Dunning* on the case of *Small* and *Oudley*. Your Lordship has observed, that Sir *Joseph Jekyll*, in his decree, gave very strong reasons against the decree, and declared himself bound by the opinion of Lord Chief Justice King, who had declared, that the assignment, being not void in equity, would not operate as an act of bankruptcy: The rest of the court differed very greatly.

That contract void, and therefore assignees shall recover.

For the defendant.

I hope your Lordship will think this so like the case of *Temple* and *Alderton*, that it must be determined upon the same principles, and the contract cannot be maintained; and therefore the assignees shall recover.

Mr. *Dunning*—The first question will be, whether a preference in contemplation of bankruptcy, be allowable in any circumstances?

2dly, Whether if any, this be not the case?

I heard not without astonishment, that my learned friend could find no distinction between this and the case of a common creditor.

So far from putting the money in order to be safe, Mr. *Fisbar* took it out of his house, where there was no danger, into the house of another, where, from the very purpose of placing it, he understood there was danger. I hope he was not so far mistaken in the degree of danger.

Your Lordship will see what the degree of danger was, and when he expected a reimbursement. In the holidays, if bank is shut, the bankers shops are open, and no relief in the ordinary way. It was foreseen when the bank would be open, about the middle of the week, and then he meant to call it out. It was meant a loan for temporary purposes, to be released on the *Tuesday* following: They agreed to the time of the loan.

That a man in contemplation of an act of bankruptcy

As to the assignment of part, that it may be allowed in general. In the case of *Worsley* and *De Matto's*, your Lordships are reported to have said, that no such proposition has may do something, tho' not every thing.

over

ever yet been established, at least in that extent. That is to say, that he may do every thing that he could have done before. I hope the contrary has never yet been established, that in no circumstances, a man in contemplation of bankruptcy can do any thing at all.

The point on which Sir *Joseph Jekyll* considered himself [480] bound by the authority of Lord Chief Justice *King* was, that there cannot be, by the law, an equitable bankruptcy where there was not a legal bankruptcy.

[Lord *Mansfield*—That an assignment by a trader cannot be void in equity was the proposition; if it was bad in equity it was an act of bankruptcy.]

Small and *Oudley*. Transfer of 500*l.* *South-Sea* annuities they sold out of the stocks. In contemplation of their bankruptcy, they, having shut up their shop, make an assignment of their stock, and also of some share in the wool trade, and some leasehold interests, to *Small*, without his privity.

It is said there, “ It may be a just reason for a sinking
“ trader to give a preference to one creditor before another;
“ to one who has been a friend to him in his extremities,
“ rather than others who, very probably, have been gain-
“ ers by their trade with him. The ignorance of *Small* is
“ a circumstance in his favour; as an undue influence could
“ not be used, or importunity on his part, in order to ob-
“ tain his debt, which is common in many cases; especially
“ as otherwise the whole debt must be lost.”

I think nothing can more expressly apply than this case.

“ The time of the assignment is not material, so long as
“ it be before the bankruptcy; but the justice of the case
“ is very material. The ignorance of *Small* is a circum-
“ stance in his favour; because it shews he did not obtain the
“ preference by any importunity.” Therefore he is so far
from making his ignorance of the assignment against him,
that he makes it an argument for him.

Can I state a case more exactly in point? The honesty of the case is very material; the time is immaterial, and the want of privity to the assignment is in his favour.

I know not an authority to which all the practisers in the profession are more inclined to ascribe great weight and great judgment. And as his honesty was known as remarkable as his learning, he has gone out of the case to say, that creditors under such circumstances not only may but ought to be preferred.

Is

Is this shaken in *Worsley* and *De Matto's*? If the point which is grounded upon the opinion of Lord King is shaken by the court, no more is shaken: And I don't conceive it affects our part of the question.

[481] It would rather strengthen our case. That case, says your Lordship, was very material. The fraud was against *Small*, not the creditors: The money was become due by the agreement; so it was here, and payable within six days. All would have gone to the creditors; so here, and they are in no worse situation than they would have been if the money had been never lent. The whole was for the benefit of the creditors; it seems sufficient for us, and all they are entitled to expect, that it's not to their prejudice. It was to save a man from breaking—the clear object of our case. Your Lordship then was so far from considering the case of *Small* and *Oudley* as not law, that, I think, the judgment has given us reason to infer that, in circumstances corresponding, *Small* and *Oudley* will be good authority: And, instead of thinking that it would be now decided otherwise, I readily declare, I can support this case on no other principles than would prove the propriety of that: And, as understanding that to stand as undefeated, I make use of it upon this.

And this is the case which has been understood already decided in favour of the general creditors; and that your Lordship had already given a solemn decision against us.

In the case of *Linton* and *Bartlet*, the shutting up shop was an act of bankruptcy in itself.

Let us see whether the other two cases answer better; which, if the other fails, will be referred to, though not now particularly stated.

It will appear they are substantially distinguished.

There are, therefore, cases where a debtor, in contemplation of bankruptcy, may give a fair preference. And the cases in which he is not allowed to give a preference differ from this, and this will bring us to the second point, whether this is to be a case of allowing such privilege, if any may.

That insolvency or contemplation of bankruptcy are no definite periods to determine when this right of preference must cease.

Before this, I will obviate the inconvenience which is supposed by Mr. *Lee*, and which he supposes will be removed by fixing at the point of insolvency. He saw the necessity of some boundary or other, and did not fear setting it. Every case would be to be determined on its own circumstances.

stances

stances—that is, left to its confusion, and the chance what light might be struck out of such darkness.

As to the insolvency —

Many are in that state when they set out. Equality is the grand object. Wherever the court draws the line all the subsequent creditors are excluded. And in our case, those who are contending against Mr. *Fisbar* would be most part in the situation into which they wish to put him.

I don't mean to misrepresent any part of the idea: For [482] besides the idea of insolvency, upon which I presume he built the mischief, he stated, to correct the mischief, the resolution to commit an act of bankruptcy.

But will this be more clear? Will it be possible to ascertain when the resolution is settled?

If other people had manifested the resolution in other cases, will this be more clear? The same day, on a turn of fortune, Mr. *Fordyce* would have altered his intentions, and gone on, with a fair credit. Is it then the contemplation? for this phrase has been always used on this occasion: It is then the fear, the dread, the expectation. The degree of this expectation, as whether certain, probable, or possible. I fear a full information would have convinced the event was certain, though not the time. A less degree of information would have made him think it probable; a still less not probable, but merely possible.

I, who have a degree of timidity from my temper, should never have looked from this horrible object for days and years before it met me in the face, and encountered me. Mr. *Fordyce*, at the time of the loan, was even more sanguine than Mr. *Fisbar*, in the expectation that the assistance of Mr. *Fisbar* would be effectual. And thus the sense or nonsense of a man's ideas, the coolness or the heat of his imagination, will be to decide this question.

But what governed *Small* and *Oudley* will govern every case to which the principle will apply: And it is very necessary this should be such a certainty which is attained by fairness, or honesty in the transaction. The rule is known and understood alike universally. Men's feelings run before their understandings, in distinguishing between a rascal and an honest man. And, notwithstanding the puzzle of the schools, when the rules are once fairly understood, and the facts agreed on, no man ever doubted the complexion of an action in that view.

That the fairness and honesty of the preference is the only proper criterion.

Hague and others, assignees of *Scott*. Assignment of goods. Letter sent, signifying the purpose. They were not

not of the coach warehouse when the bankruptcy was committed.

That part of the ground of Hague et al. assignees of Scot, was suppression.

[483]

Upon stating the case, it's clear the defendant knew nothing of the transaction: It does not appear whether he had them in trust upon contract, or to what use.

The defendant burnt the letter. Question, whether defendant has a right to those goods, or whether overhauled by the bankruptcy? Now, though it has been decided, acceptance shall be presumed, where for a man's benefit, till he dissent, yet here, when those goods were left with *Street*, what authority had *Rolliston* over them? No one can say. And it is left absolutely in the breast of the party.

When the defendant came to *Dover*, then he took the resolution of making it a bargain and sale; and as such it is void and fraudulent. This was a transaction kept secret and not determined whether he was to take them as agent, they being booked in his name in the public warehouse. Whether and how far, in satisfaction; whether as a purchaser; whether as a secret lien, in trust, to be returned afterwards in fraud of the creditors. All this left undetermined till after the act of bankruptcy had put the goods entirely out of his power.

That the case of *Le Roche* went on suppression.

That the only question there was, whether fraud, or not, and acceptance or not acceptance to be determined accordingly.

Le Roche—There never was any course of dealing between the parties. Judgment of the court there was thus: "Letter inclosed in the note is suppressed. It does not appear but the letter might contain an act of bankruptcy."

Your Lordship says there, "The only question is, whether an indorsing and sending this note is fraudulent."

"I choose to put it on this ground; for it is of importance in all judicial proceedings, particularly in matters of commerce and such public concern, that they should be determined on solid grounds of equity, and not on subtleties of law. And therefore I shall not enter upon the ground of a contract not complete till assent. The principle is this; it is complete when any principles of justice or equity require that it should; otherwise not. In the case in *Strange*, though the reasons are founded upon great subtlety, yet the hardship of the case undoubtedly decided with the court."

That the equity of this case and the law determines to imply assent.

The law and equity of the case determines the assent, in this case, should be implied.

"M

“ Mr. Justice *Yates*—There is no doubt the preference might be given on the eve of a bankruptcy, upon fair and honest circumstances.”

That Mr. Justice *Yates* allows a preference on the eve of a bankruptcy, on fair and honest circumstances.

Now compare the cases. There was in our case a friendly intercourse of lending and supplying money; there was no previous intercourse in general dealings. Here the letter produced; there it was not found. There it is not in satisfaction of any debt whatever; here is in satisfaction of the 7000*l.* lent.

The letter makes the case plain. The notes were to discharge the debt, which he could not otherwise discharge, in order to give the just preference which he expresses himself bound to give. There it did not appear but the letter might express an act of bankruptcy was committed; it appears here in the negative. There the notes were the outstanding debt to *Everard* and *Briar*, and made use of against the principles of honesty and morality. Your Lordship expressly exploded the subtleties of law upon that case, and rested upon the honesty of the case.

[484]

I will now state the case alluded to in *Strange*.

Plaintiff, as assignee of *Cripps* and *Quarme*, brings trover for several parcels of silks. Defendants dealt with the bankrupts before the bankruptcy, and *April* 7, 1715, sent the goods, and gave credit in their books. 18 *May* *Cripps* and *Quarme*, without knowledge of defendants, sent divers silks, the same sent in *April*, for the use of the defendants. *June* 4 they became bankrupts; *June* 6 they wrote a letter to the defendants, that, not thinking it reasonable the last parcel of their goods should go to their other creditors, they had not entered them in their books, but left them to the use of defendants. *June* 9 commission issued; *June* 13 defendants received the letter, and as soon as possible signified their consent. Lord Chief Justice *Pratt* says, The assent was subsequent to the act of bankruptcy: They assented as soon as they had knowledge; and whether a subsequent dissent was necessary, (the property vesting in the mean time) was the question? If by the delivery the property was vested, I think, upon the circumstances, *Butler* and *Baker*, 3 Rep. the contract does not stand open till agreement, but is complete till there be an actual disagreement.

Atkins v. Berwick, 1 Str. 165.

The distinction is, whether the delivery is with or without consideration, the preceding debt is sufficient consideration: For it being for his benefit, disagreement shall not be presumed.

A delivery

A delivery precedent to an act of bankruptcy (though to a third person, and without knowledge of the party) is, where consideration exists, sufficient to complete the contract: And disagreement shall not be presumed. And to that purpose the case from 3d Reports was applied.

And it's an authority: The person to whom delivered was instantly a trustee; and re-delivery would not have been justified by an instant countermand of the party delivering. And Mr. *Harrison*, in the case of Mr. *Fordyce*, is as the other in the case of *Strange*, under control in certain respects, to be determined on the justice and honesty of the case, and not farther; so that if *Fordyce* was wrong in the delivery, he had been justified in the re-demanding, and *Harrison* liable, if he had delivered; and Mr. *Fordyce* might have recovered.

[485] The idea of converting a post-boy into a trustee would have been ridiculous; since he knows no more of the contents than a proposition in algebra. No trust would be conveyed without knowledge of the contents: But *Harrison* knew the nature of his embassy, and would have sinned against knowledge had he delivered to any but *Fisbar*.

The four cases concerned are perfectly right, and upon comparison their agreement is evident.

I don't find my learned friend meant to contend an act of bankruptcy was committed. I understand the court delivered the case from that difficulty, which will take the fifth case out of the question.

If the case has not justice, honesty and morality at the bottom I give it up. I did not think it could have been doubted.

I conceive it will at least entitle it to the wishes and inclination of the court; and I hope on principles and authority to their decision.

But another distinction is taken, Mr. *Fordyce* is taken as under a double capacity as debtor to the house, and debtor to the partnership. If Mr. *Fordyce* can lessen the debt to the house by enabling the house to go on, either by making use of his friends assistance in the manner he did or negotiating the bills.—If this had been done the security could not be taken from him. The fund to have been divided among the general creditors would not have been these bills; there would have been no part of them. And if Mr. *Fordyce* had succeeded, he would have been obliged to pay to the partnership; the general moral obligation then will not vary by the difference of time or form.

Upon

Upon this general consideration I flatter myself, the circumstances will not be thought material to take this out of the general principles.

If the court think with Sir *Joseph Jekyll*, that there are cases in which a man not only may, but ought to give a preference to creditors, your Lordship I trust will think here that it was his duty: And as to assent that it will be presumed when the justice of the case requires it. And I hope the part we have taken in a case which seems so meritorious, and full of so much compassion will not be so ineffectual, as to fall by the force of general propositions which I think have never yet been decided; namely, that in no case whatever a creditor may have a preference given him by a debtor in contemplation of bankruptcy; and whatever the circumstances may be as to the merits and nature of the transaction, the effect of law should always be to make it void instead of its being understood, that such a preference may be justified upon circumstances. [486]

In reply—That whether fraud had been committed in a moral view Mr. *Fordyce* had done what legally he might not do; and what in the Common Pleas was not permitted in favour of a just creditor who was a brother.

This is not a contemplation according to the manner in which that word is interpreted by my learned brother, it is an act deliberate, upon knowledge that he must be a bankrupt; and he was gone in performance of his resolution before the letter could be delivered: And if any thing had diverted his resolution, these notes were not sent to the post-office, but were revocable, and were until three days after in his own possession; for the possession of his clerk your Lordship will consider as his, the case determined by Sir *Joseph Jekyll* was never doubted.

Though my private opinion would have little influence on the decision of this question, I must say if the court had not doubted, your Lordship would never have said Sir *Joseph Jekyll* gave very great reasons against the judgment.

I humbly rely therefore on the judgment of the court in favour of the assignees.

Lord *Mansfield*—Mr. *Fisbar* is certainly a very meritorious creditor of Mr. *Fordyce*, and in this last act did him a very great service. I therefore was all along sorry; (as far as one can be sorry or glad in a case of judicial litigation;) I will state the case for the bar.

The defendant *Fisbar*, was a creditor, and had done them many acts of friendship—and being creditor for 1500l. borrowed

rowed the 6th of *June* 1772, the sum of 7000*l.* and had it entered in the banker's books in the usual manner (which sum he had borrowed) and told them, he should not draw before the *Friday* following. On the 9th, the *Tuesday* preceding the *Friday*, Mr. *Fordyce* writes.*

[487] He delivered the letter to Mr. *Harrison* his clerk; he absconded at four in the morning, and never returned till the commission had issued—11 o'clock the commission issued; half after 10 the clerk called at Mr. *Fisbar's*, but did not find any at the office, called at 11 and found no body, but delivered them on *Thursday*, when *Fisbar* took and has kept them ever since; notwithstanding a legal demand.

Whether the property was duly and regularly transferred (which always includes without fraud) before the actual commission of the bankruptcy? And whether a bankrupt can give a preference to a *bonâ fide* creditor before and on the eve of a bankruptcy? Are the two questions stated.

As to the latter, the stating as a general question perhaps, involves a great impropriety. No trader can do any thing in fraud of the equality which the laws of his country require: He can't assign provisionally; he can't assign in exclusion of a creditor whom he thinks unjust; and if by deed contract is not only void but an act of bankruptcy. If not by deed they are void (as in all questions upon fraud) against those who are prejudiced, however fair between the parties. Wherever the transfer is not complete, wherever there is an executory countermandable action, the act of bankruptcy is a countermand, and takes all the power out of the hands of the party.

What was said in the case of *Worsley* and *De Matte's*, I don't recollect, I have not lately looked; but I think the case of *Small* and *Oudley* was not meant to be held not good law, or declared so at that time; nor did I ever mean to say it could never be good.

Suppose this in the regular course of payment.

Suppose legal diligence is used; suppose an execution in the house; no fraud but merely a suspicion of bankruptcy, it might be good.

Cock and *Goodfellows* in preference of the children; was a fair act done six months before; a great loan to her brother of

* (The letter stated by Lord *Mansfield* was nearly this) " Mr. *Fordyce*, " conceiving that the money lodged with him was a sum about which per- " haps even some pains had been taken to place it there, and that disputes " might arise, gives that preference to Mr. *Fordyce* which he thinks un- " doubtedly his due." Two notes, one for 5300*l.* another for 1700*l.*

of 40,000l. she did what the court of Chancery would have compelled her to have done.

So far I think the case of *Small and Oudley* goes, it was a very favourable case, the security given only 300l. where 1800l. assigned; for if all had been assigned it would have made an end; for it would have stop't his trade.

But I think the case greatly shaken in the Common Pleas.

I think that case determines, that though the act is complete, yet if the real motive of the trader is a preference in contemplation of bankruptcy, it shall be bad as against creditors.

The trader had a trade in an upper and an under shop. [488] For the purpose of carrying on his trade his brother lent him several sums and most meritoriously, as in the case here, without interest, and had nothing to do with him in his trade. Upon the 13th of *August* he makes an assignment of the goods in the upper shop, he delivers the possession instantly; the brother becomes the visible owner instantly; and acts as such. The money all lent *bonâ fide*; and as stated no suspicion by the brother of insolvency. But it is found there was no threatening of an arrest, but a preference given. It is found that there was an assignment of no more than the one-third, they did not determine upon the distinction between part and the whole: but that a preference had been given.

This went farther than any case before, for from the time of *Worsley* and *De Matto's*, it had been supposed that where the assignment was for the benefit of a fair creditor, and of part, and before actual bankruptcy it would be good; but here an assignment by deed, of part in immediate contemplation of bankruptcy, though on a valuable consideration and a most meritorious case, was of itself an act of bankruptcy. And upon the same principles if without deed would have been void.

Now see the case here—A man, with his boots on as I may say, without any demand, nor in performance of any obligation, without agreement, not so much as even in payment of a debt which then was to be called in, (for the same friendship had made the sum not demandable until *Friday*) sets up all night, this letter delivered at five and the bankruptcy committed at six before it could be possibly delivered to the defendant. It falls greatly within the case of *Rolliston* and *Scot*; a man in trade directs goods to be booked in the name and in the warehouse of his creditor, (which is the common way) and it is certainly for the benefit of the creditor

ditor to say this was payment; afterwards he went away; and not until after he declared the intent of booking to have been as payment; which then could not prevail as the property was no longer under his control: Nor did the bare lodging of the goods in the creditors name transfer the property before by any implied assent.

How is this an appropriation? Suppose the stock had risen or fallen, and *Fordyce* by either of these contingencies, for I know not which would have served him, had become a very rich man, would *Fisbar* have been obliged to accept them, if the drawees, for no fault of his, had become insolvent? What is the letter? It declares that the view is to give him a preference which has been void even without deed before the act of bankruptcy, and by deed would have been an act of bankruptcy itself.

[489] Mr. Justice *Willes*—If this case had come before the court immediately after the determination of *Small* and *Oudley*, I should have had great doubts. But I think that case has been much shaken by *Worsley* and *De Matto's*, *Hagen* and *Relleston*, and lately in this court *Patris* and *Robinson*; but I think it has been over-turned by the case of *Linton* and *Bartlett*.

But suppose that case of *Small* and *Oudley* to be now law.

The case was a transfer of 300*l.* to discharge part of a debt of 1800*l.* but here the payment can't apply to the general debt due to *Fisbar*, but must apply to the 7000*l.* Can this be said a payment in the course of trade? 7200*l.* paid in discharge of 7000*l.* I thought it had been upon a calculation of interest; but the first note is the 7th of *May*, the other is the 2d of *April*; the first would become due the beginning of *July*, the other the latter end of *June*.

The haste shews it was in contemplation of a bankruptcy; shows a preference; shows an illegal preference.

But says Mr. *Dunning*, suppose this had been paid the *Saturday*, then I think the case would have been good; but the transaction was incomplete as the case is till after the commission issued.

Atkins and *Barwick*, where the mercers refused to accept the silks.

On the grounds of the four prior decisions, and the opinion of his Lordship, I think it cannot be supported.

Mr. Justice *Asbhurst*—This is certainly a very compassionate case; but I think there are many cases which have gone farther against preference.

Small

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Small and *Oudley* had been an express stipulation; and I think, in dread of coercion; and though, I do not mean to overset the authority, I question however, if it was determined upon right principles: for though it was an act of generosity, and if successful was for the benefit of the creditors; yet, if unsuccessful and the shop was kept up for a few days, it would draw in probably a great many creditors and to a great amount.

The act of bankruptcy is in the nature of a civil death; and is a countermand of all treaties not executed. The servant knew nothing of the contents no more than the post boy.

Lord *Mansfield*—I forgot to mention in that case in *Strange*; the judgment seems very right, though the reasons wrong. The traders very honestly refused the goods, and would not enter them in their books, but sent them back. [490]

A vast deal turns upon the principle whether the sole motive to the act is a preference; or whether done without that motive, but consequentially gives a preference: There he is entitled as a trader, to the time of his bankruptcy, to do what any other trader may do. In the case of *Small* and *Oudley*, the money having become due, if he had paid it immediately (though thereby he would have done what he knew he could not do afterwards) I don't see it could have been over-set as being in the way of trade. I am very sorry for the defendant, but I don't see it can be determined otherwise, and therefore *posse* must be returned for the Plaintiff.

Distinction
between in-
tentional
and conse-
quential
preference.

Curia Cancellaria.

Beckford *against* Beckford.

ON an appeal from the Master of the Rolls—This was a question arising upon a deputation procured by the late Alderman *Beckford* for his natural son, on a security of his estate in *Jamaica*.

The point was—whether this was a deputation for his own use to take the profits, or in trust for his father.

The value was 800*l.* *per annum*, during a term of seven years, one of which was expired in the life of his father.

It was contended it was too great a provision to be made for a natural son.

Man

He

He gave him by his will 5000l. besides, and an expectancy after the death of fifteen or sixteen persons without issue, of coming in as general devisee of the reversion.

Evidence admitted, to explain the intention as of an absolute gift in favour of the son, and that the son took the profits to his own use in the life-time of his father, and has continued so to do since his decease. But the same witness on cross interrogation deposed, that the father was displeased at his son refusing to go to *Jamaica* upon former proposals, and said, "If he thinks he can do better for himself than I for him, let him."

[491]

And on behalf of Mr. *Beckford* it was contended, that his father had sufficiently manifested his affection by a present legacy of 5000l. as already mentioned, and the reversionary interest in the whole given under his will. That what he was now to contend for was only an annual profit of 800l. for six years remaining of the term, out of the immense fortunes of his father, who by the largeness of his fortune and contingent bequest had made it evident that he meant the benefit of his son; and not to leave him in a so much worse condition than the rest of his children, as he would be if he was to sit down with the 5000l. only; and the remote possibility of partaking of the future bounty of his father, as heir to the reversion of not less value than 30,000l. a year. And when he looked forward towards providing him with so vast an estate, it could not be supposed that he intended to mock him, with this gift which he had given him, and under it seen him in the actual enjoyment of the profits.

That he is not made a party to the deed as by way of trust, but expressly named as deputy in the indenture; that if it had been a common leasehold estate he would have been entitled to the rent, if a copyhold to the profits, and in this case to the profits of the office.

Thus he stands legally entitled, and *prima facie* equitably entitled; let us now see whether there is any reason to disentitle him in equity.

His son had refused to go to *Jamaica* on proposals of his father. If it be said the father altered his intentions on this refusal; (and those very proposals are evidences of affection and desire for his advancement,) but if it be said he had altered his intentions, then why name his son deputy in this instrument, on the effect of which the question arises; when he had his other son present on the island, his own agent present on the island? It cannot be said because it was a better life, for the estate was for seven years, determinable

minable only on the death of Sir *N. Herbert*. Nor could it be because he was to go over to execute his office; for he had refused it upon the supposition.

That upon the evidence it appears the father had intended the provision for his son.

As for the displeasure of his father and the words said to be spoken, will a court of justice from thence infer the father meant to resume what he had given (and what he had even no right to resume) the legal estate, and take it to himself. He might waive the appointing him agent, which the same evidence says he had intended.

Can a man suppose that a father who by one will had left him 10,000*l.* by his other will 3000*l.* *per annum*, by his now will 5000*l.* only; should mean to revoke the legal estate which he had procured him, and convert it into a trust for himself?

That it is against all the rules of evidence (especially where so near a natural relation is a party) to admit of parol evidence to diminish, and not only so but to take away the estate given, and to take away an absolute right, declared and vested by deed, and executed by actual possession: And this above all from circumstances not concomitant but subsequent to the deed. That there is ground of reason law and natural equity, to continue the legal and equitable estate in the son, where the father had placed, where the law had conveyed it; but no ground of equity to presume he was only a trustee. [492]

Where an estate has been purchased by another person for a stranger, the court will require clear evidence of the payment of the money by that person, to whose use the purchase is contended to have been made; but they will not here separate the equitable and legal estate, nor take away the beneficial interest by any implication on parol evidence, which the statute of frauds was meant to obviate.

On the other side Mr. Attorney-General.

Lord *Nottingham*, in the case of *Grey and Grey*, held that consideration of blood was a sufficient conveyance to a son named in the deed; but that of a stranger it was otherwise: That there is no case to prove that an illegitimate son would be in any other situation than a stranger; and even the *prima facie* evidence on behalf of a legitimate son may be rebutted by circumstances.

The perception of the profits during infancy has been taken as guardianship; the perception of the profits afterwards by the father has been taken as evidence to rebut the

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ground in equity, which otherwise would be in behalf of the son, but still there might be evidence to control even this.

But where the trust is not declared to him in the deed, where the son thus circumstanced, where the father took the profits (for part of the time at least) equity never considered a person as other than a trustee.

Hill and Barrow was the strongest case, but the father and son there were joint obligators in the bond, and Lord *Hardwicke* said it might be a fraud upon the marriage to consider it otherwise.

Note, As I understand the Lord Chancellor decreed that the son took to his own benefit, and not in trust.

Trust.

[493] **T**RUSTEE for children under a marriage settlement, who was to take the best security, takes personal security, and lodges the money in the hands of a banker without taking bond; for money of his own he took bond: The banker fails. This is gross negligence in trustee and shall make him liable, and it is no excuse to say he could get no good mortgage security; for then he should have placed it on public security.

Action at Common Law.

For seducing away a Journeyman per quod the Master servitium amisit.

SHOE-MAKER employs a man to make up shoes for him, and retains him by the piece; and this person being hired by another, and leaving his service, the work unfinished, the shoe-maker brings his action against the person so hiring, for enticing his servant out of his service. Such person is a servant of the shoe-maker, (though not within the particular provision of the statute of *Eliz.* concerning servants to be hired for the year,) so that an action at common law will lie for seducing him from the service.

On a special verdict, the jury found the man employed a journeyman of the plaintiff's but not for any certain time.

They found also he was hired by the piece.

They did not find particularly whether the person who
hired

hired him knew of his being retained by the plaintiff at the time of hiring.

Question: Whether this person be a servant of the plaintiff, so that he may maintain an action and recover damages, on his being enticed from his service? And whether there is sufficient upon the verdict to entitle the plaintiff to recover.

Argued: That this is a case entirely at common-law; and not upon the statute which requires the servant, for the abduction of whom from his master's service an action may be brought to be a servant for a time certain.

But still, that wherever there is an injury the law will give a remedy; and the enticing away a servant necessarily infers damages, and wrongful damages.

Brooke cites a case in the Common Pleas, in his 38 page, that for taking away a servant by force an action of trespass, *vi et armis*, would lie; for seducing a servant from the service an action on the case; but that if the servant left his master voluntarily, an action lies only on the statute.

Brooke, title Labourer. If a labourer quits me voluntarily, no action; but if any seduces him, action on the case.

Leon. 140. 11 H. 4. p. 17. cited.

As to action at common-law there is no exception to be found, which says, that in order to maintain such action, the servant must be a servant for a limited time. [494]

The act of 5 Eliz. c. 4. says, no person shall be hired for less than one year; and specifies shoe-makers; but this is only to provide against the voluntarily quitting of the service before the time, and not against seduction from it by another.

Fitz. Natura Brevium 395. If a man take a servant out of my custody, he is liable to an action.

That the defendant knew the person to be a journeyman of the shoemaker he has not denied; it must therefore be taken as admitted, and the jury do not say that he did not know.

That as to the objection of time if it were necessary to go into it, certainly an hiring without any time particularly mentioned is a retainer for a year.

On the other hand, that the facts found by the jury are not sufficient to support the declaration, for that the plaintiff declares that he retained the two persons stated in the declaration, to serve him as his journeymen in the trade and business of a shoemaker; and that the defendant, well knowing

knowing of the premises, and intending to defraud and prejudice him in his said business, craftily and maliciously did seduce the said persons, and entice them from his service; whereby he lost their service to his damages, &c.*

The jury find no hiring nor service of any determinate time.

That the jury do not find the defendant well knowing of the premises, &c. did entice, &c. and that this is very material.

That where there was no hiring at all there could be none for a year. †

That the plaintiff had stated no agreement to keep these journeymen in constant work; or that they were his servants.

Lord Mansfield—How do you define the word journeyman?

Answer: That it was apprehended to mean no more than a man who was out of his time and was no master.

[495] Lord Mansfield—Does not a journeyman imply the particular relation of servant to the man? He might work for a month at once.

Answer: My Lord, it would have been so if the jury had not found that he worked by the piece, and not for a certain time; so that they have found what sort of a journeyman: And whether, under these circumstances, he were a servant, they submit to the court. We trust that the court will be of opinion he was not, or, at least, that the facts found are not sufficient for the plaintiff to recover.

Lord Mansfield—This is apparently a service. They have found expressly he was taken by the piece: And this is a sufficient retainure.

Journeyman, I apprehend, in the original etymology, is a servant for the day; in whose service the master has certainly an interest: And they find defendant inticed this servant to leave the work he had undertaken unfinished. And it is very truly observed, that many servants are taken to work by the piece; if otherwise they would often be idle.

It just lies upon the circumstance of his being found a journeyman; otherwise it might have been that the master took any who pleased to work for him, to stay as long as he pleased, and go when he pleased.

The

* The jury I suppose found generally for the defendant as to the one of these persons.

† Omne majus continet in se minus; et qui negat totaliter partem negat.

The counsel was going to have said, that he did not lie or victual in the house.

Lord *Mansfield*—This would have been strong evidence, on the trial, to have persuaded the jury not to have found him a journeyman: But they have found him so, and it must be taken accordingly.*

Mr. Justice *Aston*—From the general inconvenience that would otherwise arise, the servant must be retained by the piece, to very vast amount. And that the statute had provided imprisonment, but no action, which shewed they recognized every man's right to his action. Every man is entitled to one who has sustained damages by wrong: Therefore, if a servant be retained for any special work, and departs from this unfinished, an action will lie against any who seduces him to depart.

JUDGMENT for the PLAINTIFF.

Curia Communium Placitorum.

[496]

W R I T O F R I G H T.

Tyssen, Lord of the Manor of Hackney, v.
Clarke.

THE court being seated, the recognitors of assize were called. Four knights appeared, and chose to themselves twelve others, which, together, composed the grand assize of sixteen jurors.

The oath administered was in this form:

I do swear that I will say the truth, whether *George Clarke* hath more mere right to hold the tenement, of *Francis J. Tyssen* demanded against him by his writ of right, or the said *Francis J. Tyssen* to him as he demands, and for nothing to let to say the truth.

So help me God,

And now, upon the motion of Mr. Justice *Blackstone*, order was made by the rest of the judges, that the galleries of the court be open for the admission of students of the several inns of court.

The door-keeper not immediately appearing, and it being apprehended that he meant to take advantage of the public

* Res judicata pro veritate accipitur.

Damnum sine injuria esse potest; injuria verum sine remedio nequaquam potest.

public curiosity, by extorting fees for admittance, Mr. Justice *Blackstone* said, he remembered when a gentleman, a counsel, had given a quarter guinea for admittance, the court was about to commit the officer: But he added, I believe, on his asking pardon, and desiring to restore the money, at the intercession of the gentleman, the court did not commit him.

The record was ordered to be read, and then the junior serjeant for the tenant, in the assize of right, had notice that he was to begin, after the record should be read.

Chairs were ordered to be set for such gentlemen as had not room in the gallery.

The record was then read, to this effect:

[427] Middlesex to wit, *Francis J. Tyssen*, by his attorney, demands of *G. Clarke*, esquire, (reciting the premisses) and faith, that his ancestor was seised in the time of peace, to wit, in the time of our late Sovereign Lord George—by taking esplees, &c. and died thereof seised: Whereupon, on his death, the said premisses, in his said writ of right demanded, descended and came to the said *Francis J. Tyssen*, as son and heir of the said *Francis Tyssen*, who thereby became lawfully seised thereof, as in fee, till he was thereof disseised by the said *G. Clarke*, under colour of a certain lease, within sixty years of the time of bringing the said writ. Whereupon he putteth himself on the country, and the said *G. Clarke* doth the like; and thereupon issue is joined.

Mr. Serjeant *Walker* opened for tenant—That the father was seised, &c. and that, after the decease of the father, the lands descended to the son, &c. And, gentlemen of the grand assize, it is yours to enquire whether tenant or defendant have the better right.

I, who am of counsel for tenant, maintain that he hath the better right.

Serj. Davy. On the same side—The case is briefly thus; the tenant's father purchased the estate, or was rather mortgagee of it, in 1736. And took a mortgage in fee, in consideration of 1000*l.* paid to the mortgagor, *Osbaldiston*; which mortgage was registered, and stood unimpeached till a late action: In which, counting on the seisin of himself, he was barred by a thirty years possession against him, and driven to this writ.

Purchase of the equity of redemption.

In 1742, *Clarke's* father purchased the estate in fee: And in the deed of purchase there were the usual covenants that party had a right to convey, and for quiet enjoyment, &c. and

and covenant to levy a fine, which was duly levied Michaelmas term, 16 G. 2. 1742.

A deed-poll, to which *Osbaldiston* and the tenants of the premises were parties (the tenants for the sake of attornment).

Title commencing in 1736, completed in 1742.

In 1706 Sir *Edward Northey* was steward of this manor.

He issued precepts to the customary tenants, to repair to the waste, and there to set out, by *metes* and bounds, how much may be enclosed, holden and enjoyed by *J. Flanders*, to his own use, without any prejudice to the other tenants, or any other her majesty's liege subjects passing this way.

To this, which was in the nature of an *ad quod damnum*, the tenants return that they, the underwritten, have viewed, and return how much the said *J. Flanders* might en- [498]
close, with the liberty of the lord of the manor, and consent of the tenants.

Provided always, that the said *J. Flanders*, his heirs, nor assigns, (which the court will tell you are applicable only to tenants in fee) shall not build any thing that may prejudice or forestall the house he holds of Mr. *Halston*, his heirs or assigns.

And this they return as a good return to the precept.

This is returned by the customary tenants, and signed, not by them only, but by Sir *Edward Northey* himself; who would never have suffered this return to the precept to be made, unless it had been a good return, and not injurious to the rights or intentions of the lord.

How, it may be said, does this apply? If there was this estate out of the demandant, Mr. *Tyssen*, more than sixty years past, the tenant who defends needs not shew his title farther, but the action is barred.

Court—There is no dispute about the identity of the premises; what is the quantity?

Answer—Rather more than an acre, with seven houses.

Title of *Osbaldiston*.

Deed of lease and release in 1736, on the 26th of February was pleaded as part of the tenant's title. It imported to between *Osbaldiston* and *Clarke*, the father of the tenant in this writ, in consideration of 1000l. Release of estate in possession of *Osbaldiston*, the lessee, reciting the dimensions, to *G. Clarke*, his heirs and assigns, for ever, with covenant of right to convey the estate in fee simple absolutely, and the same to protect indefeasible, and without incumbrances, except a quit-rent of ten shillings *per annum*

annum to the lord of the manor. And all the said within recited premises are, by the said deed, released, granted, and confirmed to the uses, trusts, and purposes therein mentioned; namely, to the use, &c. of the said *G. Clarke*, his heirs and assigns, for ever.

Proviso, that on payment of mortgage-money at a certain day, principal and interest, the said *G. Clarke* shall reconvey.

Certificate of inrollment, according to the statute.

Bargain and sale 30th December 1742.

[499]

Lease for years not endorsed.

The deed of bargain and sale recites the mortgage-money unpaid at the day, and the whole principal and interest due 1280l. besides 220l. since due, after the said mortgage (receipt whereof is endorsed for the said 220l. on the back of the deed) and the condition being become absolute of the deed of mortgage, the mortgagor bargains and sells to the mortgagee, for fuller confirmation of his title in the said premises, all his estate, title, interest, equity of redemption, claim or demand whatsoever, to the said *G. Clarke*, the mortgagee; and for farther assurance covenants to levy a fine.

Vide
Hitchen
and Basset.

Fine sur concessit thereupon. Note of the fine read. Proclamation: These were not read; for the court presumes a fine to be with proclamations, till the contrary be proved.

The tenant is son, and heir at law to the said *G. Clarke*.

The tenant called witnesses to prove his title, and I took a long note of the evidence, which, as far as is not matter of law, I omit.

On the other side, for *Francis J. Tyssen*, who brings this assize as demandant, to recover his right to the premises.

Gentlemen of the grand assize, I hope I shall shew, to your satisfaction, as concerning the premises in question, that they belong of right to *F. J. Tyssen*, and that he has more mere right to demand than the tenant hath to hold them, and has a much superior right to that claimed by the tenant.

My brother *Davy* has admitted, that in 1736 the claim originally arises. He, knowing always what is best for his client, would have stopped there, but asking a direction of the court, and they not choosing to give him one to stay there, he proceeds to shew a title, as he says, in fee, out of the lord, and in a third person, as far back as 1706,

But

But all that appears then is, that the fee was in lord with a licence to enclose with the consent of his tenants.

As to the subsequent conveyance, no proof of payment, but as between the parties; but if a real transaction, still I shall contend it was not such an one as can prejudice the title of the lord, on account of their iniquity.

I mean to shew that *Osbaldiston* was only a tenant to demandant; and I dare say none of you, gentlemen, take the trouble of sending to the register, to see whether your tenants have done as *Osbaldiston* did; taken upon themselves to convey in fee when they have only a term estate. [500]

The demandant claims as lord of the manor, where he and his ancestors have immemorially used to have the waste; and the premises in question are and immemorially have been parcel of the waste.

Mr. *Tyssen's* grandfather died in 1710, father in 1717; and the demandant himself was a posthumous son.

Within this manor there hath immemorially been a custom for the lord of the manor, for the time being, having a desire to grant any part of the waste, under a certain rent, to issue precepts to the tenants, to enquire whether the ground may be enclosed without prejudice. These are generally forty or fifty years leases, to encourage tenants to improvements. I shall shew a great number of these precepts; and there never was an instance of a precept made to convey in fee.

The intent, I shall shew, was only to grant for a term of forty-one years, from Michaelmas then next ensuing.

My brother *Davy* has said, that had it not been the intent of the lord to grant a fee, Sir *Edward Northey* was so very learned and accurate, that he would not have suffered any thing so improper in his office as words to be used and signed with his name; which import, my brother *Davy* says, a conveyance in fee to have been intended. But I am afraid none of us now at the bar are so extremely accurate; nor was Sir *Edward Northey*, or any man, always aware, and always in the right. At most, it's no proof a conveyance in fee; and goes no farther than evidence of such a thing in agitation.

J. Flanders died intestate, leaving several brothers, in 1720; the widow took out administration, and became entitled to all the personal estate, and took this amongst the rest.

She made a will in 1721, reciting that her late husband, by consent of the lord, had built four small messuages on the
the

the waste, in the place in question; and she directs them to be sold by her executors. She makes *R. Osbaldiston* and *R. B.* her executors.

And, by a codicil dated 28 July 1725, she revokes that part of the will, and appoints *R. Osbaldiston* sole executor.

[501] *Osbaldiston* came in as executor, paid the ten shillings rent, which had been paid all along: He himself paid it the first year. The demandant was then in his minority; the receivers charge themselves with the receipt. I submit to my lord, the receipts even of a common bailiff are evidence when he charges himself; much less can there be a question in this case.

Under these circumstances the tenant, *Osbaldiston*, makes the conveyance. This even, as by a tenant for life, was fraudulent and void; and good for nothing, but as by way of estoppel between the parties.

Though my brother *Davy* would avail his client as a fair purchaser, without notice, I apprehend this will not serve him. Indeed he rather recommends his client upon that ground than pretends to avail himself of this supposed circumstance as a ground in law. If this were upon an equitable question it might have been a ground; but we are now on the mere right: And you are to find only upon a strict legal estimation which has the greater right. Though, upon the circumstances, it does not appear (if it was at all material) that there was not fraud; but the contrary: For it is far from evident that the tenant came in as a fair purchaser.

I rely, therefore, that I have shewn a better and superior, and more ancient title, whereon, in justice to your oaths, you will find for the demandant.

Witnesses called for the demandant.

E contra for the tenant, in replication—That as to the observation, that it had always been customary to grant term estates in the waste of the manor, but never in fee, the right of a person claiming under the lord of the manor, by his grant, shall not be prejudiced by any custom of a manor. He shall never qualify his own grant made, in any single instance, in fee, by any custom which has obtained in the manor. Now here, I submit, there is evidence of a fee granted, by the precept and return.

Court—You have not shewn the precept. However, the recital of it on the return is sufficient for your argument.

I contend then, my lord, I have brought evidence of a grant in fee: And what says the lord? “It has been usual for me and my ancestors to grant otherwise.”

For

For the demandant—I do agree, if you had produced a grant in fee, the lord cannot qualify his own estate. But if you produce presumptive evidence upon the *præcipe*, I only desire to shew that the effect upon that *præcipe* has only been a lease for years.

E contra Serjeant *Davy*, for the tenant—That from the [502] time of the return of the *præcipe*, in 1706, to 1736, it does not appear any way how possession stood: But thence there appears a possession under a supposed tenancy in fee, against the lord. And he repeated that the words “heirs” and assigns” are not applicable to less than a fee.

Lord Chief Justice *De Grey*—I own, for myself, I have no doubt of the competency of the evidence. The lord is found out of possession, except by taking the rent a part of the time. I take the possession, for the present, to be as upon the return.

It was very properly compared to a writ of *ad quod damnum*, and will have the same effect. I don't speak what weight it will have with the jury, as presumptive evidence. When this writ issues, and the jury make a return, this does not amount to a grant.

It is not collateral evidence which is here offered, to avoid an actual grant, but evidence to explain a doubtful matter, and to shew upon the custom, (of which we must understand this *præcipe* and return to be part) that no greater estate has been wont to be granted; and then the farther evidence will come out.

Mr. Justice *Gould*—I think it material—I think this cause would be closed by this evidence. I take it that this is not now competent, admissible evidence. It appears *J. Flanders* was in possession of a particular spot of ground, and wanted to acquire more: And there is evidence, as Serjeant *Davy* observes, that he was intended to take a fee. Confining ourselves to the instrument, and not going into the extrinsical circumstances, by conjecture, we find they had in contemplation to grant a fee. I apprehend this is evidence. From the year 1706 there has been an enjoyment of *J. Flanders*, and those deriving under him ever since. This I take to be evidence which amounts to proof of above sixty years possession under a conveyance in fee. If this were an ejectment, twenty years possession would induce the bar; and here, where the possession has stood for above sixty years out of the lord, I conceive precisely the same inference will arise.

This

This is not properly a custom as a foundation of a person's title; but it is usage only. And as every man's grant must be taken most strongly against himself;* and it is not pretended the lord might not grant a fee, therefore I think presumption on usage cannot be set up against it.

[503] Mr. Justice *Blackstone*, *contra*—I hat the return was only presumptive evidence of the grant of a fee; against which other presumptive evidence might be set up. The steward, by his signing, does not give any assent to the propriety of the return; and the men who made it were ignorant men, and false grammar and bad sense are in the outlet. To the presumptive evidence of a grant in fee, may very properly be set against it presumptive evidence of a grant for years.

Mr. Justice *Nares*, *contra*—I wish they would have gone farther, which would have taken away my brother *Gould's* doubt; but, on the present state of the question, I think there is no ground to admit the evidence.

Lord Chief Justice—I think it very proper to let in a presumption. The lord grants a power to grant to *Flanders*: This is not compulsory on the lord; it is only executory, and the lord may or may not make such a grant in future. Does it appear executed? Is there any rent reserved? Any thing conclusive? No: But they say evidence of possession, consistent with the grant, is conclusive. But what is the evidence? It will apply to possession in fee; it will apply to possession of a term: *Percipitur ad modum percipientis*. There is to be sure a faint presumption; but there ought to be some evidence of constant possession. Then where is the difference if they go on and shew the instances, that on such a precept the usual way is, to grant for years beneficially for the lord. And it is indeed very strange that the lord should grant in fee, without reservation of rent or services.

Mr. Justice *Gould*—I only desire to be understood. My ground is on the possession, of which my Lord *Holt* says, twenty years makes and proves a seisin in fee upon ejectment; and so say I: And, therefore, I say sixty in an assize.

Presentment given in evidence on a præcipe, to set out waste tenement to *A. et heredibus*—no condition added.

Counterpart of the lease upon that return; the lord leases out for years. This seemed to be designed to empower the lord himself.

Evidence

* Verba fortius accipienda contra proferentim.

Easter Term, 14 Geo. 3. C. B.

Evidence of applications to renew lease on surrender of the old.

16 Dec. 1661. Return. Question, whether original return; steward examined. He was asked, whether it appeared on the books? No; there were no books farther than May 1661. Which book begins 1658.

When does the chasm begin?—From May 1661, and [504] ends 1664.

Is this an original præcipe, though it does not appear in any book?

I believe it is a copy.

Have you searched whether there are more books, with proper diligence?

I can't say I have.

Where did you find the papers?

Delivered with other leases.

Besides this, said the court, there is a record of a return, signed by the steward himself, stating return how much he may convert to his own use. No words of heirs or assigns.

Indenture of release between the lord and customary tenants, reciting the precise term, from Michaelmas 1751; year's rent 6s. 8d.

Court—Are any of the leases entered upon the court books?

Answer—No, my Lord.

Nor any memorandum?

No, my Lord.

Return sets out waste, with dimensions; lease 28 December 1711. This an approvement.

It was observed by the court, how important it was, as well for justice, as for saving of time, to have had the books. Returns stated at the distance of ten or eleven years from one another; and it does not appear how many intermediate licences there may have been in fee.

The learned Serjeant vindicated himself, as not having been retained till the day before the trial.

Lease granted before the court, day, which was held 18 April 1707.

Return. Waste of the manor, view, and setting out by [505] mites and bounds. How much the lord may inclose for his own use, by consent of the customary tenants. House in the occupation of *G. Clarke*. Indenture 1706.

A term of forty-one years granted.

Another term of ninety-nine years granted, in the waste, at the yearly quit-rent of 3s. 6d.

The

The will of *Catabrine Flanders*, in 1726, read.

The court observed, that it could not be much relied on what the expressions were in such wills; but that she did not consider this estate in question as personalty: For she gives the houses in case her personal estate should fail.

Answer—That she did not take his goods for personalty; for she couples them with the houses, in the same clause. And at least the meaning may be, my other personal estate.

Osbaldiston, the grandson of *Osbaldiston* who conveyed to *Clerke*, examined.

Have you found any lease amongst your father's papers?

Answer—Yes; I have.

On being called on to produce it, he produced the draught of a lease.

Serjeant *Davy*—Question, whether what they offer in evidence is admissible, to prove any lease?

First, If a paper were to be read coming from a grantor, on valuable consideration to impeach the grant, it would be very bad. And next, supposing this draught were evidence, it is evidence only of an intention to lease. This is not a copy; but a draught only. Even if it were a copy I should take objections: But it does not import to be a copy of a lease ever made, or even meant to be made.

They say there is a counterpart of a draught; I know not on what evidence: But take it so, and it only proves no such lease was ever executed; for then why keep the draught.

[506] Serjeant *Hill*—I submit, my Lord, we have already given evidence sufficient to shew some lease or other: And I apprehend the question is, not whether a grant in fee, or a lease; but what kind of lease! For that there has been some lease, of some kind or other, is plain; for it has gone in a course in which it could not otherwise have descended to personal representatives, and not to heirs.

Rent has been paid, it appears from their own instrument: And no pretence of its being a quit-rent.

That perhaps this was a copy, and not a draught of a lease.

That the loss of a deed could only be proved by probable circumstances collectively, and not by positive direct evidence in general. That the lease, having been carried, with other papers, during a long minority, backwards and forwards into the court of Chancery, might probably be lost.

If lost, the best evidence will be received of the lease which the case admits. That here there was evidence of hand-

hand-writing, and sufficient proof of execution, from the manner of possession, and course of descent.

Serjeant *Grose*—That the paper was admissible, according to the rules of evidence, whatever weight it might merit.

That undoubtedly it was admissible, on proof of the loss of the original.

2dly, That, it being an ancient transaction, loss would be presumed when the course and nature of the possession shewed that it must have been as of a chattel real, and not an estate of freehold.

3dly, That it might be good to rebut the presumption of an estate of freehold; though it might not, of itself, have been good to establish an original demanded.

That, on all hands, it must be admitted, the presumption of a lease is open; because the demandant has not made good his title, by shewing a conveyance in fee. That, therefore, such evidence must be produced in a dark case, to maintain probability upon circumstances, and try what light can be had.

The evidence will apply to all he has offered: For it proves at least a lease intended, but not executed; which is just the case of the grant in fee, which he claims on the precept and return, which are only executory, and not evidence sufficient to prove a grant executed. And where is only presumptive evidence of a freehold, this will go to repel that presumption, by shewing there was a communication about a leasehold; and then the observation will apply in its full force. They say words have been used in [507] what only imports an intent to grant; words only good, say they, to pass a fee. We shew an intention against that argument, which presumes an intent to convey a fee, by giving evidence of an intent to grant a lease. And it will have weight, that it is the only paper which appears, in this cause, to shew a grant of any kind made or intended in consequence of the præcipe.

Serjeant *Davy*—My learned friend seems to misunderstand the grounds of the objection. The rule of evidence is, (I mean to reason upon the supposition of the facts, which they will prove afterwards if it be necessary) that every thing shall be proved by the best evidence which the nature of the case will admit. Books of an attorney, memorandums of an attorney, have been admitted in evidence, even of a recovery: But inferior evidence never was admitted in proof a fact, not done at the time, but subsequent, not at all necessarily dependent on it; and, for any thing
N n that

that appears, if it ever did exist at all, still proveable by evidence of itself, and from the nature of the evidence brought to prove it, as well as from the evidence on the other side, unlikely ever to have existed.

Court—That the ground was laid down too largely; for that draughts have been admitted in proper cases.

Serjeant *Davy*—My Lord, I did not mean to say that evidence of a draught was inadmissible; but only that it never went alone to prove. And that here, as to proof of intention, it proves nothing; for it does not appear which party produced, or which rejected it. That it would be irrelevant: That the searching for the lease, and not finding it, would never go to prove its existence: That it rather concluded it never was.

Court—To prevent the failure of justice, the law has laid down a rule that no one should suffer what he cannot help.

V. Ley-
field's case.
Co. Rep.

But in order to give evidence of an instrument as lost, you must prove such an instrument did once exist; you must prove contents; and you must prove destruction, or loss.

But it is not necessary to prove actual present existence by the deed itself; (which, if you could do, you would generally prove contents) but you must give reasonable ground to the court to believe its once existence. Neither need you prove authentically the contents; for that would imply power of production.

[508]

It was also said, that if this was an independent question, it would not be right to admit the bare draught to prove a lease, of which there was no evidence that it had been lost, or even that it ever had existed. But that here rent paid had been proved; enjoyment proved as under a lease; and that the estate had been applied as part of the personal assets.

That correspondent instances had been produced of many leases granted on building terms, and no evidence hitherto on the contrary of a fee having passed. Evidence that there possibly might be, not evidence that there was.

That there seemed to be a case where evidence had been refused of an inferior nature, because the party applying had not made a search in the archiepiscopal court of York for the proper evidence in that cause. But that here it appeared that the same search has been made in the court of Chancery, and no counterpart has been found. But a copy has been produced, and another copy was produced:

duced : And it appears to have been a precedent for draughts of this nature, with change of names.

Whether it will be more for the demandant or against him, I shall not now remark : But though it may go farther than former cases, yet, upon the circumstances, I think it ought to be admitted on the foot of presumptive evidence.

It appeared in evidence, that two years rent had been paid by *Osbaldiston* for the premises, after the death of *Catharine*, widow of *J. Flanders*.

But it was farther observed from the Bench, that she makes *Osbaldiston* executor of her real and personal estate. (Of both.)

Witness called to prove an obliteration of an indorsement on one of the two papers given as evidence of a lease. The indorsement was, " Another draught made ;" and the witness acknowledged striking out these words. Observation, that, from the appearance, these words were first erased, and then struck through with the ink.

Court—This should have been mentioned before : For it might have prevented its being admitted in evidence. For a draught manufactured, though the erasure afterwards explained, might have been refused.

The witness examined.

Did you consider yourself as attorney against *Clarke* ?

Yes.

At the time when you did this you was concerned for Mr. [509] *Tyssen* against Mr. *Clarke* ?

I suppose I was.

Had you not for several months before been concerned ?

I believe I was.

April 1770. Was it not ?

I do not know.

Is that your hand-writing ?

It is my clerk's, and I signed it.

This was a letter in May, threatening an ejectment : In July the alteration was made ; and Mr. *Tyssen* never employed him afterwards.

Was it on account of this ?

Answer—I gave the papers, and I said I would appear whenever it came before the court.

Observations to the recognitors of the grand assize, on the part of the tenant.

Evidence on the part of the tenant of a purchase in fee, for a valuable consideration, 1000*l.* lent upon mortgage of the premises, six years before. That they had endeavoured

voured to suggest fraud, because *Clarke*, at thirty-eight years distance from the mortgage, could not prove payment.

The term they would speak of expired in 1747, commencing in 1706, and continuing, they say, forty-one years. The demandant, Mr. *Tyssen*, was then thirty years old. This lease is not said to have been cancelled: It was a standing precedent, they say. Mr. *Tyssen* then knew the term was expired. Why, then, not call for a surrender, and make a new lease? For the estate was improved very much by the erection of houses upon it; an improvement natural to be made by a tenant in fee, but not very usual, or easily accountable, in a tenant for years. If this had been a term estate estate the lord might have demanded, and was highly interested in demanding, a surrender, when the term expired. He might have done it then; and would have done it certainly: But he has not. What is the consequence? That there never was a lease granted—That some proposals there might be.

Laying down this *postulatum*, that possession is the best guarantee, perhaps, of half the inheritances of this country, and ought to be so, and estates so held ought not to be shaken but for strong cause, the application strikes of itself, irresistibly.

But, independent of possession, what evidence is there here, not only of what the possession has been, and is, but that it ought to be as it is and has been?

The præcipe directing a view to enquire and return whether such a piece parcel of the waste, and admitted to be the premises in question, may be enclosed by *J. Flanders*, to be holden and enjoyed by *T. Flanders*, his heirs and assigns.

Answer—That it may; and *T. Flanders*, his heirs and assigns, shall not do so and so.

Both præcipe, therefore, and return go to a fee simple. If there be other precepts and returns, of like kind with this, and yet for years, I grant it a full answer.

But they say there is another instance, where the præcipe and return speaks the same language with this; whether such a piece may be enclosed, to be held by the lord and his heirs, and they answer yes. Certainly; it was his fee simple. What they consent he should inclose was his fee simple before.

This is 21 April 1704. There are two more such, 1707 and 1711, both to the lord.

Easter Term, 14 Geo. 3. C. B.

1758. To know how much a cottager may enclose without prejudice; not a word to his heirs and assigns.

1761. To enquire what part *Flanders* may enclose for his own use; they answer he might so much for his own use. Lease fifty-one years granted, third of April, 1741, how much Mr. *Clarke* may inclose; but no mention of heirs and assigns.

What does this prove? That the word heirs and assigns has never been made use of but when it should.

The reason of relying on sixty years possession is, that it was thought necessary sixty years possession should be proved. They were resolved to try a method of precluding us; when, in all common instances, twenty years possession is sufficient: And I believe no body in court remembers an action of this nature. However, if sixty years possession be not proved, which would absolutely bar an action, yet, if a possession of about fifty years be proved, a continued, undisturbed possession, such as it is highly improbable could have arisen but under an estate in fee in the tenant, and those under whom he claims; if this possession stood many years after the present demandant came of age, unshaken, unmolested, unquestioned; if it be imprudent, in the highest degree unnatural to suppose, and even incredible, unless upon demonstration, That Mr. *Tyssen* should suffer a possession so long, deceitfully to others, and injuriously to himself; if the precept by the steward of the lord himself, and such a steward, of such learning and accuracy, Sir *Edward Northey*, whom you will not presume to have erred, only because it is necessary to my friend to desire you to presume it, and because he says it's possible, a præcipe issued, to enquire of the premises how much *J. Flanders*, under whom the tenant claims, might inclose to his heirs and assigns—If they return that he may inclose the very premises in question to his own use, to hold and enjoy to himself, his heirs and assigns: If it is used as real estate; passed as real estate, by several deeds, by fine, by will—There is full authority, and the highest reason, to presume that it did (as these circumstances, precedent and subsequent, this evidence of record, evidence of possession, evidence of the lord himself concur in proving) actually pass in fee; and was meant and understood so to pass. [514]

As to no instances of estates in fee passing in the waste of the manor, there are no instances of such words used, except in the case of the lord himself, where it could pass no other-wise, and here.

But

But this estate, say they, went in the course of personalty. *Osbaldiston* took by two titles, as personal representative and residuary legatee, under the will *Catharine Flanders*. You will judge whether she meant to give it to him as personalty, when the words of the will contradistinguish it clearly from the personal estate.

But the receivers have charged themselves with the receipt of the rents. The question is, whether quit-rents or conventional rents. They take no notice which of these it is.

That they are not accurate is plain; for they take notice of three years received of *Catharine Flanders*, at a time when she was dead. (It was objected, that the receivers had distinguished this from quit-rent.) What does it import, whether the receivers thought it quit-rent, or annual rent? And what mattered it to them which it was?

[512] Let me close all with the objection with which I began: You have before you a person claiming under a fair purchaser, for good and valuable consideration, who paid as for the full value of a fee; never questioned for about fifty years, and never disputed in the life of *Osbaldiston*, and his assigns, on whom they might have come for value. I submit, from the hazard of estates in general, and the inequality of the risque in this particular case, you would not have been inclined, even if the evidence had been nearly equal, to decide against a possession so dearly purchased, enjoyed with such expence, and carrying with it such tokens and evidences of right. Very precarious, indeed, will be the condition of almost every man's estate, if the evidence by which it is to fall needs be no stronger than that offered by the demandant; and if evidence so various, so clear, so unexceptionable as that on the part of the tenant, shall be insufficient to support it. Thus much to the general justice and safety. As to the particular justice of the case; if Mr. *Tyssen* loses any thing, he loses what he and his ancestor have overlooked at least, and treated as not their own for a long course of years; and what he now claims not very favourably at least. If Mr. *Clarke* loses any thing, it will be that which came to him from his father, as by legal descent from a fair honest purchaser; what at least appears to have been intended for him in the manner in which he claims it by the father of Mr. *Tyssen*, the now demandant, what he, and those under whom he claims, have enjoyed openly, peaceably, continually, without dispute or doubt of their title, for such a number of years, as has been already stated:

stated: What has been brought to its present state of value at great costs and trouble on the part of those from whom it is now attempted to be taken by your verdict; what those who claim cannot shew any title to have; and what has been enjoyed hitherto without any evidence of any other title of enjoyment, except in the manner and in the extent in which they still hope the justice of your decision will enable them to retain it, if intent of parties, possession, and the strongest presumption of law and reason are sufficient to entitle them.

Lord Chief Justice *De Grey*—

Gentlemen, You are the recognitors of the grand assize, on a writ of right, to try the right to a piece of ground, now become valuable by houses built upon it: And you are to decide upon the mere right, without regard to the possession.

I think you will better understand the evidence if I bring historically the facts before you.

Mr. *Tyssen* was lord of the manor of *Hackney*, where, I suppose, there was more waste formerly than now.

By the common law, a lord of the manor may enclose, leaving sufficient to the tenants; and this is called improvement: But he must shew he does leave sufficient. A grantee cannot do the same. This, probably, introduced the mode of providing him beforehand with the acknowledgment of the tenants. [513]

This custom has been prevalent in the manor about a century, and, with a few scattered instances, in the former century.

Here is a precept, issued by the steward, to enquire how much *J. Flanders* may enclose of the waste in such a place, being the premises in question, to the use of himself, his heir and assigns; and the return is, “That he may enclose the premises in question, to hold and enjoy to himself, his heirs and assigns for ever: But provided, that neither his heirs nor assigns shall build any thing against a certain house.”

It appears *Flanders* was in possession of the premises after this return: No grant appears, nor lease.

He died about 1720, his wife took out administration; and, as administratrix, she enjoyed the premises. There was an house at that time.

She gives by her will her house, and by the latter part all her real and personal estate, to *Osbaldiston*; whom she appoints her executor and residuary legatee. Whether therefore,

fore, for years or in fee, it would pass. She paid rent, and *Osbaldiston* pays rent for two years afterwards.

Two years before Mr. *Tyssen*, the now demandant, came of age, Mr. *Osbaldiston*, with no title but under the will, as far as appears, mortgages in fee. The mortgagee does not appear to have enquired into the title, and pays 1000l. upon it. In 1742 he pays 500l. more, and purchases the equity of redemption; and a fine is to be levied for further assurance. A fine is accordingly levied, and it goes upon the possession, and what effect he might suppose the fine had.

It is observable, that in this conveyance no notice is taken of *Osbaldiston's* title; and he sets forth the house as partly built by himself and part before, without saying by whom. You will judge how far this seems to effect the fairness of the title.

You will consider farther, whether in 1706 there was a lease for years, or a grant in fee: One or other you are to presume.

It is observed on the præcipe and return, that not only *Flanders* personally, but his heirs are interested; and his heirs are to comply with the condition expressed in the return.

[514] As to the rent made payable, it is ambiguous: In point of quantity, it is what we see reserved on the building leases; but it might be reserved upon a grant in fee.

Another objection, if it had been a grant for forty-one years, in the year 1747 Mr. *Tyssen* was much above a minor, and suffers possession till 1773. This is not a bar, nor used as such; but only as evidence, upon the tacit acknowledgement for twenty-five years, and to shew that it was not a term of forty-one years; and no middle case is stated: If it was not a term it was a fee.

The fine is no farther than as proof that *Osbaldiston* meant to convey a fee; for it is no bar when tenant for years levies a fine.

Mr. *Tyssen* desires you will observe how far this supposition of a conveyance in fee agrees with the general usage, before, at the time, and after. This is only a circumstance against their circumstances of presumption.

They desire you would consider that possession has gone accordingly, as of fee. But to this contrary presumption is set up, that it does not appear how the wife took it; she might take it as personalty: That *Osbaldiston*, who took from her, might take a personal representative. And as to the

the words of the will, perhaps much stress is not to be laid on them, as it is certainly very inaccurately worded.

Another thing, they rely, that if *Clarke* suffers, he suffers by his own fault; for he relied on the possession, and had no title deeds. And he waited till 1742 before he relied on the fine, which could not be good if it had been from one seised of the freehold, right or wrong, before 1747: And if by one, as they say, possessed of a term only, it was void from the beginning, and non-claim could not make it good.

The receiver's account is only made up for Mr. *Tyssen* by his agents, and bars no one else.

I will now state the evidence. Conveyance by lease and release from *Osbaldiston* and wife to *G. Clarke*. This is a mortgage in fee, and recites that he has a good, absolute, and indefeasible estate of *fee simple* in the premises, and has good and lawful power right and title, to convey the same in fee except only a quit-rent of ten shillings, due to the lord of the manor, and he covenants to convey accordingly.

* His Lordship proceeded with the rest of the evidence: [515] That in 1742 *Osbaldiston* released the equity of redemption in fee to *George Clarke*, no evidence of fraud. Covenant that estate is free from incumbrances; and to levy a fine. In 1742 a fine levied by *Osbaldiston* and his wife, to the use of *George Clarke*, (the father of the tenant) in fee: The tenant is admitted to be his heir. Possession proved in the father and son from that time to this; a deed poll of attornment of *Osbaldiston* and the tenants, to *George Clarke*: This, as is presumed, might be a fee.

Evidence on the part of the demandant—That his ancestors have been in possession, and lords of the manor of *Hackney* before 1706. Usage to issue precepts, and make returns, in the nature of writs of *ad quod damnum*. And if return that it would not be prejudicial for lord to enclose, used to enclose so much as was set out in such returns, and make leases for years; and to be sure he might grant in fee if

* The trial lasted, I believe, about eleven hours. Vide this case and the form of proceedings in the third volume of *Serjeant Wilson*, from whose learned Report I have taken the liberty to borrow the substance of the summing up, from this mark.* I was present at the whole of the trial, but my paper failed me, and I did not take notes (or at least not that I can make out) at the latter end, so far as from the above mark.

Vide also *Sir William Blackstone* on the writ of right, and its incident trial by *Battel*, vol. 3. c. 10. Ch. 22. s. 5. Vol. 4. c. 27. s. 3. Ch. 33. s. 2. tit. 4 & 5.

if he pleased; but by the usage it appears they were all leases, and no instance of a grant in fee.

As to the draught which came out of *Osbaldiston's* hand, that if one were to conjecture, one might, that Mr. *Tysen's* attorney at that time made the draught. A draught the least kind of evidence—lessee might refuse because he wanted a fee, or did not like the covenants and conditions. Nothing appears to have been done in consequence, and doubtful whether ever any lease.

Strange how both parts of a lease (if ever there was one) could be lost or destroyed; if *Osbaldiston* had destroyed the original, one would think he would also have destroyed the draught; but no evidence of destruction, because no positive evidence of a lease; nothing but circumstances. That the counterpart, supposed to be in the hands of the lord of the manor, is also lost. (If there ever was one.) That if there was a lease, it might be for ninety-nine years, for any thing that appeared, and so, that way, the right would be still in *Clarke*, the tenant to the writ.

[516] That these draughts appeared to be the weakest possible evidence to prove that a lease existed. If they presumed a lease, upon the slender evidence of these draughts, they must presume it to have been according to the draughts; that is, for forty-one years.

This is the substance of the evidence on both sides; on which you are to determine whether the tenant has a greater right to hold the tenements in question to him and his heirs, or the demandant to hold the same to him and his heirs, as he has demanded them.

The recognitors of the grand assize withdrew for about the space of half an hour, and then brought in

VERDICT for the DEMANDANT.

B. R.

Case of Sir John Carter.

ON a motion for an information, in the nature of a *quæ warranto*, against Sir *John Carter*, to shew cause why he exercises the office of burghess in the borough of *Pertsmouth*.

The charter gives power to the majority of the mayor and aldermen to elect such and such like as they shall choose, to be burghesses of the corporation.

One

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One of the objections was, that at the time of his being chosen, Sir *John Carter* was an infant, under the age of discretion, and that he was then admitted a burges; which election and admission was illegal and void.

And it was contended, that all the elections of mayors and recorders since this election of Sir *John Carter* were illegal and void, in consequence, supposing he was illegally chosen burges of the corporation.

With respect to the first objection, it was said that in two cases which had been cited on the other side, (one from *Barnardiston*) in both Lord *Hardwicke* is said to have declared, that he did not know it had ever been determined: And that it does not appear that either of those cases have been determined to this hour.

That, on the other side, to repel this objection, it did not seem necessary to cite many cases, and that there seemed no reason against the infant's being elected into such an office; [517] for that the right was derivable upon him then from those who had the power to confer this privilege, and might be exercised afterwards,

That this was a ministerial office; and ministerial offices may be executed by an infant; and that by deputy an infant may execute even a judicial office in most cases.

Case of the Duke of *Bedford*, on an information to shew cause why he exercised the office of the *Bedford* company.

First objection, that he was not sworn before the proper officers, nor in the proper place. On this the rule was made absolute.

Second, that he was a minor; and upon this latter the court did not determine, but considered the objection in a manner that infers, if it had been necessary to have determined, it would not have prevailed.

Besides this case, (which at least shews the objection was far from thought conclusive, or very strongly founded) on the consideration that the practice in a vast variety of boroughs, and even in this, has gone in support of this kind of elections, it is to be presumed the objection will not now meet with any great degree of favour.

As to the second objection, that this election must necessarily be preceded by summons, and that there was no good mayor to make a summons, and therefore no good election. The answer, that all who could have been within the reach of the summons came, and but one of the body was absent, who

who was out of the reach of the summons, and came not, by reason of particular business.

That here was not a case of filling up these elections with infants, to the prejudice of others, who might otherwise have been chosen, the number being indefinite.

As to the majority of the mayor and aldermen, that this was sufficiently answered, if when six aldermen, and the mayor being present, the aldermen voted; nay, even if the mayor had been absent.

It is certain as to the former objection, of age, that the king can confer a peerage on a person under age; and a peerage certainly infers a judicial trust.

Lord *Mansfield*—How is it when they are entitled by servitude? Are they ever admitted before of age?

[518] [Note, It seemed that in some cases the sons of freemen were freemen by descent, even before the admission of their parents.]

Cre. Car. 576.

Infants are capable of taking of their own private benefit any thing that is not prejudicial to the public. This is a mere personal franchise, with no administration of the court business; nor has he any thing upon the choice of a mayor.

If they say an infant cannot be elected burghers, they must say the king cannot appoint an infant burghers; nor could he have done it upon the original constitution. If the king could, he has given them full power; for he has given them power to elect so many and such as they shall choose.

That acquiescence for many years, even down from 1751, when Sir *Thomas Gibbons* was elected a burgher, and many others since, ought to be grounds to avoid disturbing the matter farther.

Statute *W. 3.* That no person under the age of twenty-one shall be elected to serve in parliament, and that if any be, such election shall be null and void; and a penalty if any under age presume to sit. This shews that before the act it was not thought or understood by the legislature, that such election was void; but that a special provision was thought necessary, to make void for the future, as to that particular case of elections to serve in parliament; which would not have been if it was void generally before.

Burgers not within the test-act, *Fitz-Gibbons*, 193. And the reason assigned is, because he does not exercise a magisterial office in the corporation.

There

There were six counsel spoke against the rule, and six were going to speak on the other side.

Lord *Mansfield*—The only thing we are now considering is, whether the rule shall be made absolute; that is, whether it shall go to trial.

The only thing which struck me is what concurred in the latter part of the argument. It was said, upon circumstances, that the court would not interpose, to disturb the peace of the corporation. And if there had been a great course of years, and it had been likely to go to the extinction of the corporation, it might have been so.

This being on a point of doubtful law, the argument from lapse of years (there not being any danger of extinction of the corporation, and the party complaining not being a member) does not apply, as beyond matter of fact. [519]

Indeed in a case of a dubious fact, whether residence or not residence, they were not permitted to proceed, having staid an unreasonable time, till the proofs of residence might reasonably be presumed to be extinct.

As to the question in law, whether an infant is capable of being chosen a burges, it may be a very considerable question. To be sure, an infant is capable of all grants of interest and property.

Suppose the crown had appointed an infant on the first institution, admission would not have been necessary.

The nature of the privileges of burgeses may make a great difference.

But it goes conclusively to grant the rule absolute: It is said, don't grant the rule absolute, because it has never been decided; because it is a point of very great consequence, and may disturb the corporation. But it is therefore that the court will grant the rule absolute; because it is of great consequence; because it has never been decided; because almost all the corporations in the kingdom are interested.

It is said the case before Lord *Hardwicke* stands upon a demurrer. Is not this a reason why it should go to trial, and not be decided in a summary manner, where there can be no error against our judgment?

But it seems (it is said) it's determined in this court; there is a solemn judgment: And *Barnardiston* is cited. The ground of the determination and the nature of the burges's office there is not stated: And I believe that it was a matter of property and interest rather than of trust.

The

The court was clear, as to the first objection: Then, says the serjeant, the court declared the other objection was not material; that is, I suppose, because the rule went absolute on the first objection; and therefore not material to consider the other.

No meeting of the aldermen without a mayor could be good.

And he must act, *eo nomine*, as mayor.

[520] It is a clear case to make the rule absolute, indeed as of course.

RULE ABSOLUTE accordingly.

Recordari facias loquelam.

THE writs of *recordari facias loquelam* are conditional.—
If the cause be true, then he is to return the writ.

Plaint.

DEFENDANT cannot legally remove plaintiff without cause; plaintiff may.

Costs on the Statute.

WHERE an indictment is removed by *certiorari* from the quarter-sessions, the master shall tax the prosecutor his costs; and if not paid within ten days an attachment shall issue: And also the recognizance shall stand as a security.

Error.

IT seems bail are not answerable for costs in error.

Outlawry.

IT being on a felony, the defendant was brought to assign error in person.

And he assigned for error several causes.

1. That no public proclamation is mentioned to have been made.

2. That

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2. That it is not mentioned he dwelt out of the parish, and therefore proclamation was made in the next adjoining parish.

3. Nor that it was made immediately after the sermon.

4. Nor forthwith after the service, as directed, if no sermon.

That there was a misnomer of the coroner.

[521]

That he is stated to be within the kingdom; whereas, in truth and in fact, he was abroad the whole time.

Lord *Mansfield*—This last of the objections is an error in fact, which the attorney-general will agree to confess. As to errors in point of law, it may be material to consider them.

The next day Mr. Attorney-general prayeth assignment of the error in fact might be read, and it is read accordingly.

Judgment, that the OUTLAWRY be REVERSED, and DEFENDANT RESTORED to all that he demands.

New Trial.

IN a case where a verdict had been found against evidence, but according to the merits. The court will not grant a new trial where the jury have found according to the justice of the case, tho' they may have found against the form, and may have been wrong in so doing: For when the substantial justice appears to have been answered, the court will not suffer the chance of its being defeated; nor the parties to be turned round to a second trial, when the merits have been decided.

Lord Archer *against* Whitehouse.

TRESPASS for digging the soil of the plaintiff's heath.

Defendant justifies, under a conveyance from *Sherlock*, late Lord Bishop of *London*, who demised the soil in question, as of his own purchase, to Sir *Thomas Gooch*, under whom the defendant justifies.

The jury found for the plaintiff.

This was on a motion for a new trial.

Evidence from the report, that the plaintiff had brought action for damages done by cattle on the warren, which was the place in question.

That

That there had never been any rent paid to the bishop.

[522] That the lands had been always held, and reputed to belong to the lord of the manor.

That rents were regularly paid to Lord *Archer's* father.

That ejectment was brought against one of the tenants, who refused to pay rent, and his lordship turned him out of the manor.

That he never heard of any rents paid to the bishop; but about fifty years ago rent had been demanded by the steward of Sir *Thomas Gooch*, who claimed in the bishop's right.

Another witness, as to the reputation of the ownership of the soil, and the ejectment against the tenant refusing to pay rent as above.

They set forth a lease of *H. 8.* and a grant of *Philip and Mary*, which recites the lease, and grants *totam warrenam cuniculorum ac unum tenementum nostrum super eandem warrenam ac universum stagnum nostrum super eandem warrenam continens per affirmationem, &c.*

Evidence for the defendant, that the soil of the heath had always been reputed to belong to the bishop: That only the bishop's tenants had a right to fish in *stagno prædicto*.

That rent had been paid to the bishop.

That about fourteen years ago an acknowledgment had been taken of encroachment upon the heath.

At the trial Serjeant *Sayer*, who then sat in the commission of assize, observed the presumption was in favour of the owner of the soil; and that an ejectment was a strong assertion of ownership. That the fishing might well agree with the soil, being in another; but not so well the cutting of turf, whereby the feed of the rabbits was diminished.

In point of law it was contended by Serjeant *Davy*, at the assizes, that by grant of the term the soil was severed from the manor.

Serjeant *Hill*—That *warrena cuniculorum* was different from *warrena* simply, and that after the term the soil would reunite to the manor, and according well passed under the grant of the reversion by *Philip and Mary*.

The new trial was moved upon two grounds.

[523] 1st, That one as for a supposed misdirection of the jury.

2dly. The other as for a verdict against evidence.

The

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The warren was in another person at the time the manor passed, but the grant of the reversion of the warren was under the same instrument by which the manor passed.

On the other hand it was relied on, that nothing less than the soil passed with the franchise, *unum tenementum super eandem warrenam*. Now this tenement could be only upon the soil, and not upon the incorporeal franchise, and metaphysical substance of the warren.

Lord *Mansfield*—What title do you set up? It certainly comes to the manor by the lease from *H. 8.* it could not come to your hands but by a lease from the lord of the manor: I should like to see some such lease. You have no ground. It is the clearest case in the world. *H. 8.* granted a term; *Philip* and *Mary* grant the reversion of the warren, together with the manor: They clearly passed jointly.

You have the enjoyment of the warren; you must have it by some written title; you have not shewn it: We shall presume it was because either the words were not such as would pass the soil, or expressly nothing but the franchise.

Here you have shewn no title—the verdict will be no bar whenever you can shew one.

Replevin.

HERriot. Custom set forth; namely, that the lord is entitled to the second-best beast at every death or alienation of a tenant.

And farther, that if the tenant has but one beast, then he is to pay the beast; and if he has no beast, then provision for a certain compensation in lieu of it.

In the evidence of the custom it appeared there was an exception of *mesne signiories* and manors, lands holden in ancient burgage; and also of alienation to the use of *alienor* and his heirs, or to the use of the last will and testament, or as jointure to his wife.

Mr. *Bearcroft*—The question submitted to the court is, whether the custom set forth on the cognizance is agreeable to evidence. The custom is set forth as a general custom in the manor, that the lord is entitled to take after the death of every tenant who died seised, (cfr. as above.) He [524] called many witnesses to prove the custom exactly as it was laid. The parol evidence not being full, the decree in the court of the duchy of *Lancaster* was produced in evidence. And, taking the custom as it appears on the face of the decree,

cree, it will appear first to your Lordship, that the exception only extends to the last instances, respecting alienation.

The first words are as general as can be. "Upon all and every alienation of all and every piece or parcel of land, freehold or customary." And I apprehend the exception only extends to the last instances, which do not affect our case. As to the exception, where there is no beast, it is very reasonable; but it makes no part of our case.

Mr. Justice *Ashen*—How do you confine the exception to the last particular?

Answer—The decree goes on several cases; first, where there are two beasts; second, where but one; last, where none. And then it takes up a new branch, and separates the case of death, or alienation, and of this it makes a distinct sentence, and goes upon points to which this case of ours does not extend—Alienation to use of alienor and his heirs, last will and testament, and settlement for his wife.

As to lands, they except only *mesne* signiorities, lands holden by knights service, and ancient burgage.

Lord *Mansfield*—I am sensible in point of form the exception is good, though there is nothing upon the merits.

There is an exception of lands in ancient burgage, or *mesne* signiorities. As to knights service, it is at an end.

Leave to have a new trial, on payment of costs, and that the defendant be at liberty to amend.

Fenton's Case.

Escape.

DECLARATION states a debt, arrest, and subsequent escape.

[525] It was objected, that there was no proof of the *capias ad satisfaciendum* delivered. But the *non est inventus* returned by the sheriff was held by Mr. Justice *Willes*, the judge who tried, sufficient evidence against the sheriff to conclude him.

It was farther insisted, that here was no arrest; for that no warrant was shewn; and that the person who actually made the arrest was son to the bailiff; and that the bailiff was within about thirty yards, but not in sight.

Under

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Under the directions of the court, it was left to the jury, who considered the son as aiding and assisting his father.

6 *Mod.* 211. No determination; it was where the bailiff's assistant went up stairs. The bailiff did not go up stairs, but staid at the bottom.

It was said, that the distinction of law seemed to be, that the bailiff must be *quodam-modo* present.

On the objection taken that no warrant was shewn, and that the arrest was not made by any sheriff's officer.

This it was intimated had not been spoken to at the trial.

As to the bailiffs not being present, that there was evidence sufficient before the jury for them to find him present, at least so far as was legally necessary. And that the taking need not be expressly and manually by the bailiff; but the act of the son or servant is the act of the bailiff, within the statute.

It was argued *ab inconvenienti* if the doctrine should be held otherwise.

That there was a case in *Salkeld*, and in 3 *Modern*, upon this subject, with this difference only in *Salkeld*, that he says the bailiff was no way present.

As to non-appearance of the warrant, if this had been an action of false imprisonment every thing must have been strictly pursued, and the authority clearly shewn; but otherwise here, where the sheriff is charged civilly.

Lord *Mansfield*—Was this objection mentioned on the trial?

Mr. Justice *Willes* said he had taken no note of it.

It seemed to be agreed at last, that it was cursorily mentioned at the trial, but not much relied upon.

It was said, that it appeared in evidence that upon the instant escape, *Fenton*, the bailiff, said, "Then I myself [526]
" must pay the debt."

That as to the father's not being present, all evidence is to be considered according to the persons to whom it applies, and the manner in which it is answered. If the father was not by, why did they not call the son, and prove he was not? If they denied the warrant, why not disprove it by the officer? They having done nothing to negative the evidence, it stands in its full force.

Another counsel said, that it appeared, as to the case in 3d *Mod.* that a verdict was given for the plaintiff; and that it did not appear that verdict had been complained of.

The sheriff has no right to say to the plaintiff in this action, "I did not give a warrant in writing, because, as between me and my officer, I proceeded as upon his discretion."

If he cannot say it, there is no evidence either way; so that the court cannot say there was a warrant. A writ delivered to the sheriff, and endorsed by the officer to whom he gives it, to execute that process.

Mr. *Wallace*—That it was very true, the plaintiff's alleged in their declaration, and were very studious to prove an arrest; and with reason; for if no legal arrest no escape.*

Now to prove the arrest, it must be proved either that he arrested personally;

Or some body in his presence, or by his command, or delegated authority.

Now as to the second, no less authority than under hand and seal will be good, nor can any man be justified for making such arrest.

Your Lordship on such a case, properly before you, would have discharged the prisoner; and it is strange if the sheriff should abide the consequences of the arrest as legal, where, for want of legality, the prisoner must have been discharged.

They are obliged to prove two things; authority from the sheriff to the bailiff, and an arrest by the son, under that authority, and in presence of the bailiff, or at least by his command.

[527] Could not they have called up the sheriff's officer, to have produced the warrant? Then, upon a refusal, they might have called in parol evidence, to prove such a warrant had existed.

But farther, had they proved the warrant, I submit, this is no arrest to charge the sheriff.

The sheriff may authorize a bailiff to arrest; the bailiff may act solely, or with others; but they must act under his authority, and, as I conceive, in his presence.

The evidence is, that the old man was in the house, and continued there—And your Lordship will find rods instead of yards, which makes it about two hundred yards.

Mr. *Cox*—That it would be extremely hard and inconvenient if this were to bind the sheriff: For that this man staid in a different part of the town from the bailiff, in whom the sheriff

iff placed his confidence; the son made the arrest in his absence, and in an improper place; and no attempt to shew *Fenton* heard of it till some time after.

Mr. *Morgan* objected, that the authority being demanded by defendant, and none shewn, therefore the arrest bad.

6 Rep. 54. It was resolved, that the sheriff, or any other, by his authority, ought to shew at whose suit, for what debt, out of what court, and when process returnable.

And so was Lord *Holt's* opinion in the great case before him.

Lord *Mansfield*—It's a very hard action, and to be sure, in an action attended with so much hardship, the jury has a leaning, as far as the justice of the case will permit.

One of the objections taken is, that the arrest was not by the sheriff's officer himself, the father being the officer, and the son the hand arresting.

That the officer must be a party by presence, giving authority, or some way, is certain. He need not be actually in sight. The exact distance is not necessary; but he must be upon that business at that time.

A witness proved that he went out of the public house on purpose to arrest him.

There is no certain speaking of the distance at a particular time; only when the witness saw him he was about that distance. Now all evidence is to be weighed according to the evidence produced on one side, with what might have been produced on the other. Now the son was a very proper person to have been called by the plaintiff, to have given evidence against his father; for, in fact, they have brought this evidence against *Fenton*; for the bailiff always gives security. [528]

It was very fairly left to the jury, who have found upon a case not probable in its circumstances: And if we granted a new trial we should say that, upon the weight of the evidence, they ought to have found for the defendant, which in doubtful circumstances we will not do.

As to the other objection, I think the return to the writ is sufficient evidence against the sheriff; for he shews thereby the *capias satisfaciendum* was delivered.

Mr. Justice *Aston*—That there was great reason the bailiff should be present, or so nigh as to be supposed in readiness to act. Now he might have been out of the house; for they make the house three hundred yards distant at least, and he could not be more—taking it thirty or forty rods—than

150 or 200 yards. It is certain he need not be in sight, because he may stand to watch.

Mr. Justice *Asbhurst*—That the arrest was good, though not by the hand of the bailiff, he being near enough to act.

That the slightest evidence of the existence of a warrant would have been sufficient. Now *Fenton's* name appears indorsed on the writ, which is stated to be the custom of sheriffs, with respect to the officer to whom they deliver the warrant.

RULE for granting a NEW TRIAL DISCHARGED.

New Trial.

Covenant.

ACTION for breach of covenant. Defendant replies *non fregit conventionem*. The question turned upon repairs; and it appearing in evidence that there were thirty-eight years to run on the premises, out of a term of forty, the jury thought the injury was rather to the possession than to the landlord. They found for the defendant; whereupon the plaintiff moved for a new trial: And for the rule they contended, "That whereas the defendant covenanted to [529] "and with the plaintiff to keep the premises, from time to time, in good and sufficient repair." Now if the landlord was to wait till the end of the term, defendant might assign, and landlord be at a loss for his remedy. That if nominal damages had been found, so as to oblige the tenant to repair, it would have been sufficient.

Notice had been given to tenant to repair. The lead, it appeared, had been stolen off the house, and the tiles, to come at it. But the damage had been repaired in a great measure; and the jury said they believed there was not above a shilling damages upon what was left unrepaired. Mr. Justice *Aston* said, upon so small an occasion, they would not: And the court never was used to grant a new trial.*

Rule discharged. Absent Lord *Mansfield*.

Whitebread

* De minimis non curat lex.

Interest reipublicæ ut sit finis litium.

Res indicata pro veritate accipitur.

Periculosum est quod non bonorum virorum comprobatur exemplo.

Whitebread *against* Brooksbanks.

ACTION for money had and received, against an excise officer.

Question, Whether the bounty to be allowed on exportation was to be determined by the average price, settled in the manner prescribed by the statute of his present majesty, or the price at the exporting port.

Special Verdict, that the plaintiff drew from malted corn 2600 barrels of beer, when barley was under the price of twenty-four shillings per quarter: That the beer paid all the duties; that plaintiff claimed to be allowed one shilling per barrel on exported beer when barley was at or under the price above-mentioned.

The preamble of the statute recites,

“ Forasmuch as it hath been found by experience that the
“ exportation of corn and grain, when the price thereof is
“ at a low rate in this kingdom, hath been a great advantage,
“ not only to the owners of land, but to the trade
“ of this kingdom in general :

“ Be it therefore enacted, &c.”

Then the act goes on to provide, that when malt or barley, Winchester measure, is or shall be at four and twenty shillings per quarter, or under (and so of rye and wheat, when at the prices in the act mentioned) in any port or ports of this kingdom, or of the dominion of Wales, every merchant, or other person, who shall put on ship-board in English shipping, the master and two-thirds of the mariners at least being the king's subjects, any sorts of the corn aforesaid, with intent to export the said corn, every such merchant, or other person, shall bring a certificate in writing (in the manner the act directs) upon bond given of two hundred pounds at least, for every two hundred tons of corn so shipped, and so proportionably, that the same shall be exported to parts beyond the seas, and not again landed in Ireland, Wales, Guernsey, Jersey, or Berwick upon Tweed, shall be allowed by the farmers, commissioners, &c. in any port where the corn shall be shipped, for every quarter of barley or malt, ground or unground, two shillings and six pence. [530]

The act whereon the defendant rests his case is the tenth of his present majesty, c. 39. intitled an act for registering the prices at which corn is sold in the several counties of Great Britain, and the quantity exported and imported.

And

And it recites, that “ whereas a register of the prices at
 “ which corn is sold in the several counties will be of public
 “ and general advantage, be it enacted, &c.” And it em-
 powers the justices, at their general or quarter sessions, after
 the 29th of September, yearly, to order and direct weekly
 returns of the prices of wheat, rye, barley, oats, and beans,
 from not less than two or more than six markets, and appoint
 a proper person, inhabitant of such market-town, to make
 such returns. And the lord high treasurer is to appoint a
 proper person to receive such returns, who is to enter them
 in a book, and publish them, or an abstract, weekly, in the
 London Gazette, and four times a year make certificate of
 such returns to the clerk of the peace of every county, &c.

And an account of the quantities of corn exported and
 imported from and to Great Britain to be transmitted annu-
 ally, and kept by the person appointed to receive and publish
 the returns of the prices above-mentioned.

13th of his present majesty, c. 43. The preamble re-
 “ cites, that whereas the several acts of parliament hereto-
 “ fore made, concerning the duties and bounties respectively
 “ payable on the importation and exportation of corn and
 “ grain, have greatly tended to the advancement of tillage
 “ and navigation, yet nevertheless, it having been of late
 “ years found necessary, on account of the small quantities
 “ of corn and grain in hand, and the shortness of the
 “ crops, to suspend the operation of those laws by tempo-
 “ rary statutes; whereby the benefits derived from the said
 “ acts of parliament have been, during such emergencies,
 “ withheld and suspended: And whereas the regulating the
 “ importation and exportation of corn and grain by a per-
 “ manent law, under such general rules and provisions as
 “ might render, for the time to come, such temporary laws
 “ unnecessary, would afford encouragement to the farmer,
 [531] “ be the means of increasing the growth of that necessary
 “ commodity, and of affording a cheaper and more con-
 “ stant supply to the poor, and preventing abuse in that ar-
 “ ticle of trade; be it enacted, &c.”

The act goes on, that whenever the prices of several
 grains, &c. mentioned in the act, shall appear, according
 to the methods directed by the several acts of parliament,
 or after directed by the said act, to be mentioned in the act,
viz. middling barley at or above twenty-four shillings a quar-
 ter, all duties and customs payable respectively on wheat,
 &c. barley, bear, shall respectively cease, determine, and
 be no longer paid, or payable, during the respective conti-
 nuance

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nance of such respective prices as aforesaid. And certain duties, mentioned in the act, are to be in lieu; to wit, six pence *per* quarter on wheat, two pence *per* quarter on all barley and bear, &c. and such wheat, &c. barley, bear, &c. may be carried coastwise, and entered or landed in any other ports of this kingdom, where the prices of middling corn, grain, or flour, are at or above the respective rates aforesaid, and ascertained in the manner aforesaid; under such regulations as at the time of making the said act.

That by the act of his present majesty, the act of *W. & M.* is referred to, and the exportation is regulated at the prices at the port of London, and that the usage down to 1770 has been so, and is found by the verdict; but that the act of 1770 altered the rule.

That the registering act of the tenth had a different object than the bounty on importation or exportation—to fix permanently the limits of exportation or importation.

The act of the thirteenth of his present majesty recites the convenience of a permanent law.

Then the practical rule of the statute of *W.* stood unaltered, of estimating the price at the exporting port, which here was London.

It was contended, that the price of corn has ever varied in different parts of the kingdom; but it was not meant the average plenty or scarcity should be the rule of the bounty to be allowed at a particular port. That it might be the rule for stopping exportation in a discretionary way; but till the exportation was prohibited, the bounty annexed would depend on the price at the particular port from whence the barley, bear, or other articles mentioned in the act were to be exported.

As to the policy, that if an exporter from a plentiful market were to be confined to the price at a scarce market, corn would remain a drug; it would be useless to the owner, and to the public in general: Whereas otherwise it might turn the balance in favour of this kingdom, in commerce with others. [532]

That as to any combination which it might be suggested might take effect, against this the parliament had provided. If the price falls it cannot be raised but by fresh supply. When there is an exportation largely made the price must rise, and then there must be an importation, and the price will sink to the exporting level again; so that the evil will cure itself.

That

That if the crude commodity is beneficial to a commercial nation, the manufactured must be a great deal more beneficial. Duty large upon the malt: on the beer, when made; and a great multitude of hands employed in the working of it.

If the tenth of his present majesty has made no alteration; if the thirteenth resumes the former wisely established rule, the plaintiff is entitled. It would be very hard, without an express alteration; that a man should be working, at a great expence, with such an uncertainty who should reap the benefit.

That the candour of the commissioners of excise was to be acknowledged, in putting the plaintiff to this easy way of trial: And that they hoped, from the justice of the court, that he should recover by it. Mr. *Davenport* argued for the plaintiff.

Lord *Mansfield*—You have omitted stating this in the special verdict; though I thought it had been by consent, as you say. As the verdict stands the action could not be maintained. Commissioner takes as money due to the crown. It is an error upon the special verdict, which might have been cured by words of consent inserted. You can't have an action of this nature (but on payment) against an officer.

Mr. Justice *Aston* said, that it did not appear whether this was strong beer or small, and the bounty was allowed only on the strong.

Mr. Justice *Willes* seemed to propose an amendment by consent.

On the other side, Mr. Serjeant *Walker*—That this is not the case of corn, but beer.

The first act of parliament material to be considered upon this subject, since the statute of *W.* is the first of *G.* 3. which, though it refers to the first of *W.* 3. does not drop an expression whether at the price of the port of exportation, or at the average price. But till the tenth, I will take for granted, it was by reference confined to the port of exportation.

[533]

But at the making of the latter act the legislature perceived the inconvenience. The price from the place of exportation would be a very uncertain ground of the bounty; there might be a very good market in London; there might be a glut of corn; they might be obliged to sink the price: And then, on this construction for which the plaintiff contends, they might be at liberty to export with the encouragement

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ment of a bounty, and great quantities might be exported, while, in the mean time, there might be a great scarcity of corn in the other parts of the kingdom.

Lord *Mansfield*—Does the tenth of this king vary the bounty on corn, according to the average price?

Answer—No, my lord: It alters nothing.

In answer to these objections it was contended, that average price was merely an ideal price: That though the act does not speak of the price of the beer itself, it speaks of the commodity from which it is raised.

That the act of the tenth of his present majesty is merely an act of enquiry: Varies no price; restrains no bounty; makes no alteration of any law existing.

That by the 13th they found they had gained the clear exporting and importing rules.

That if the construction contended for against the plaintiff was to prevail, either a variation in the act or proclamation should have been made; for that otherwise the exporter is brewing to a loss, expecting profit.

Lord *Mansfield*—My only difficulty is, to see the ground on which the excise has gone: I mean in varying the former usage.

By the act of King *William*, giving a bounty on the exportation of corn at such a price, the rule is by the exporting port.

The act of the first of the present king has been governed by the price of barley at the port.

The tenth goes on a very different ground; but whether politically or not has been since doubted, and it is not material to say.

The parliament determined to see, perhaps, how far exportation or importation might be allowed; and, perhaps, to make new laws.

Then the 13th determines the price of barley; and the bounty upon beer is to be governed by it.—If the parliament had meant to make a difference, it would have cost them but three words; they could have said “the average price” was to regulate the bounties. [534]

The revenue laws are generally attended to. They have said no such thing. If the original rule was (as admitted) by the port exporting, I see nothing since that can have varied it.

Mr. Justice *Aston* observed, that the rule was according to the statute of 1 *W.* which was recited by 1 *G.* 3. Then, as to the acts on the 10th and 13th, what has a man at the port

port of London to do with knowing the average price of barley?

The same words are to receive the same construction, if nothing appears to alter; which, I confess, I am not ingenious enough to find.

Mr. Justice *Willes*—That the 13th pursued the former rule.

Mr. Justice *Asbhurst*—That the case would be the same as as if it had arisen a year after the first of the present king, which is evidently governed by the first of *W.* and nothing since which can vary.

Curia—You must take it by consent, without exception to the form of the action, or the circumstance of its not being said whether small beer or strong. I mention it for the sake of the precedent: For it would be attended with terrible inconveniences if an action for money had and received could be brought against an officer acting under these circumstances.

Note, For statutes respecting corn, vide 51 *H. 3. B. 6. anno 1266.* 34 *E. 3. c. 20.* 1 & 2 *P. & M. c. 5.* 17 *R. 2. c. 7.* 4 *H. 6. c. 5.*

[535] At what prices exportation to be permitted, vide 15 *H. 6. c. 2. anno 1436.* which allowed exportation when wheat was at six shillings and eight pence a quarter, and barley three shillings, which is rather less than a sixth part of the price at which wheat is forbidden to be exported by the 13th of his present majesty; and rather less than a seventh of the price at which barley is permitted to be exported by the same act of his present majesty: So great an effect has been produced in 337 years, by the encrease of specie, and other causes, in lowering the value of money; and so little at the same time does the relative value of wheat, compared with barley, appear to have altered. Vide also 20 *H. 6. c. 6.* 23 *H. 6. c. 5.* 5 & 6 *E. 3. c. 14.* 1 & 2 *P. & M. c. 5.* And it is very surprizing, that this last statute appoints precisely the same price at which corn may be exported as the 15 *H. 6. c. 2.* had done, six and eight pence *per* quarter for wheat, and three for barley, at the distance of 118 years from the statute of *H.* and not more than 219 from the 13th of the present reign. This no difference in the first period, and a difference of six to one in the latter, within less than double the space of time, I suppose must be ascribed partly, as to the former, to the plenty and cheapness of corn, which the politic expedient of *Henry the Seventh*, in encouraging small farms, had produced; and

and in great measure, as to the latter, to the vast introduction of commerce in the reign of Queen *Elizabeth*, and since, which has so exceedingly diminished the value of money.

1 *Eliz. c. 11. §. 11.* makes no difference as to wheat, but as to barley, refers the standard of allowing exportation to the 5th and 6th *Ed. 6.* which had placed it at 3s. 4d.

5 *Eliz. c. 5.* entitled an act touching politic constitutions for the maintenance of the navy, advances the standard of exportation to ten shillings for wheat, and six and eight pence *per* barley: So that, as to barley, it doubled in only five years; and of wheat it raised the standard of exportation one fourth: And the relative value between them, instead of two to one, and rather more, appears to have stood at three to two. This was in the year 1562; but in thirty-one years after, *anno* 1593, the standard for exportation of wheat had doubled, and was risen to twenty shillings; and barley was nearly doubled, for from six and eight pence it was risen to twelve shillings.

In 1604, four years after the establishment of the East India company, 1 *Jas. 1. c. 25. §. 26.* the standard for wheat rose to twenty-six shillings and eight pence, (an increase of above one-fourth in thirteen years) and barley to fourteen shillings, which advanced the standard of that one-seventh, and brought their relative value pretty near to the old proportion of two to one.

Anno 1623, in nineteen years more the standard of wheat was carried on to thirty-two shillings *per* quarter, (an advance of one-sixth) and barley to sixteen shillings, (an advance of one-seventh) and their relative proportions stood now precisely as two to one, as they had done in the 4 & 5 *Edw. 6.* and as they had nearly done in 15 *H. 6.* In 3 *Car. 1. c. 4. sec. 24.* it stood unaltered; there was but four years between this and the precedent statute; but in five years of Queen *Elizabeth's* reign how great the variation is already remarked.

But in 12 *Car. 2. c. 4. sec. 11.* *Anno* 1160, we find the standard for exportation of wheat at forty shillings, and for barley twenty; so that in thirty-seven years the standard of wheat had risen near one-fourth, and of barley one fourth above its former height: And in one hundred and eleven years from 4 & 5 *E. 6.* it had risen as to wheat to six times, and as to barley the same. And by 15 *Car. 2. c. 7. anno* 1663, entitled an act for the encouragement of trade, the standard of wheat stood so high as forty-eight shillings,

shillings, or seven times the standard of 15 H. 6. and barley twenty-eight or above eight times the same standard.

Cole against Ingold.

Bill of Exchange.

ACTION upon a bill of exchange by the drawee of a promissory note against the acceptor.

Objection upon demurrer to the first count that a drawee upon a bill of exchange may come as indorsee against the acceptor; but it must be when acceptor has effects of drawer in his hands as acceptor is entitled to recover over against drawer if not satisfied.

On the other side that the count was good, and they were going to argue.

Lord *Mansfield*—Nothing in it: The acceptor says he has value: and if he has not effects our law is very good, he will not recover on the bare signature. I don't know that "VALUE RECEIVED" was necessary upon the count; *prima facie* acceptance is evidence of value received; though you may shew, as in all cases, why the plaintiff is not intitled. Upon action on the case, the plaintiff must always recover upon the justice of his case.* Don't you bring a thousand actions upon a promissory note, and they shew there was no consideration; and that the plaintiff had notice there was no consideration.

Note, The doctrine of bills of exchange being important and in frequent use; I hope I shall be excused in adding the following note concerning it, consisting of rules collected from decisions in the books.

[537] Indorsee of a bill of exchange may be a witness. For mere indorsement of the name only does not transfer property. Vide *Salk.* 130. *Lucas v. Haynes*, *Pasch.* 2 *Ann.* B. R. and vide *supra Clark v. Pigot*, *Salk.* 126. 8. *W.* 3. to the same effect.

Bill

* Sunt jura sunt formulæ de omnibus rebus constitutæ ne quis aut in genere injuria aut ratione actionis errare possit; expressæ sunt enim ex unius cujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætoræ formulæ ad quas privata lis accommodatur. Vide the passage of Cicero pro Q. Rosc. cited in the motto to the 2d vol. of the Dialogues on the Law and Constitution of England.

Actio ad privatam litem ex æquitate legis accommodata quæ actio casus nostratibus dicitur semper prout justitia ex æquo et bono temperata pecculat, operatur.

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Bill thus "pay to me or order" is a bill of exchange without more if accepted. *Sed vide* case below.

Butler v. Crips, Tr. 2 Ann. B. R. Salk. 130. Declaration on first bill want of averment, that 2d and 3d not paid would be fatal; but shall be aided after verdict. 1 Salk. 130.

Of bills of exchange that they need not be stamped. Vide 5 & 6 W. & M. c. 21. sec. 5.

Of inland bills protest for non-payment. Vide 9 & 10 W. 3. c. 17.

Protest needs not be set forth in the declaration. Salk. 131. Mic. 2 Ann. B. R. *Borough v. Perkins*. 6 Mod. 80. S. C.

For non-acceptance, vide 3 & 4 Ann. c. 9. sec. 4. which act gives the like effect and remedy to promissory notes.

Bill of exchange is not discharge of a precedent debt, unless it is part of the contract that it should be so—*Clarke v. Mundel*, 3. W. & M. Salk. 124. But by the last mentioned act it is non-payment unless acceptor takes due course to obtain payment, and make his protest as there provided. Vide sec. 7.

Bill payable to *A.* or bearer not assignable to charge the drawer; but good as between indorser and indorsee; and the indorsement in the nature of a new bill. Drawer of a bill is a merchant *pro ista vice* and for that purpose. *Hodges v. Steward*, Pasch. 3 W. & M. Salk. 125.

But *quare* as to the 5th point of a general *indebitatus* not lying upon such bill of exchange for want of consideration averred, and its being but *nudum pactum*; for though a promise by parol without consideration is but *nudum pactum*, and will not bind in law (Vide Doctor and Student.) Yet when it is cloathed in writing (I do not mean by deed) the law will see sufficient certainty and will enforce the payment. Vide the case in Sir James Burrow, of Pillans and Rose, v. Van Merop and Hopkins, and the whole doctrine very fully and excellently laid down from page 1670 to 1672. And upon the authority of that case, one similar was determined a term or two ago, which I propose to insert in its place.

Acceptance of a bill by one partner binds both, if it concerns the joint trade; otherwise not. *Pinkey v. Hall*, Salk. 126. [538]

That indorser is liable only on default of drawer, resolved by Holt Chief Justice. Mic. 10 W. 3. *ibidem*.

Drawer not chargeable, unless he hath notice of drawee's non-payment in a convenient time. *Allen v. Dockwra*, Mic. 10 W. 3. Treby Chief Justice. Salk. 127.

Promise

Promise to pay *secundum tenorem billæ* after the day past, impossible: Yet it shall be performed express, for it operates as a general promise to pay the money. *Jackson v. Pigot.* 10 W. 3. Salk. 127. And vide *Mitford v. Wallicet.* 12 W. 3. Salk. 129.

Pasch. 11 W. 3. Held by Holt Chief Justice, that on an action on a bill of exchange there was no need to prove the drawer's hand; because if the bill was forged, still indorser was bound to pay it.

But 2dly, the plaintiff must prove he demanded of drawer or drawee, and he refused; or that he sought, and could not find him.

3dly, That in a convenient time; which, for foreign bills, he held to be three days, and no allowance for Sundays or holidays.

4thly, That in fairness he should give notice; and, as it now seems, in law he must.

5thly, Demand must be proved subsequent to indorsement.

6thly, That if a man indorses on a blank bill, he puts it in the power of indorsee to make what use of it he chooses, either as an acquittance to discharge the bill, or as an acceptance to discharge the indorser.

7thly, That in bills purchased by discount, bill payable to A. or bearer, is an absolute purchase; but to A. or order, and indorsed blank, and filled up with an assignment, indorser must warrant, as if no discount. *Lambert v. Pack.* 11 W. 3. Salk. 127.

Declaration against drawer good without an express promise; for there is an implied promise in law. *Starkey v. Cheesman.* 11 W. 3. Salk. 128.

Clark v. Martin, and *Pollet v. Pearson.* Salk. 129.

[539] These two cases, a promissory note not binding before the statute, seem not to have been law, and the principle *ex nudo pacto non oritur actio* mistaken, v. *supra* to the contrary of those cases.

Course of foreign usance must be averred upon foreign bills, Salk. 131. *Buckley v. Cambell.* Hil. 7 Ann. B. R.

A. indorses notes in satisfaction of a debt, which notes are accepted; and before receipt of the money drawer breaks; indorser shall be liable, and not acceptor.

And by general law every indorsement is a new bill, and all and every the indorsers are liable as a new drawer; but that by custom the indorser may be only liable on default of the first drawer.

Indorser

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Indorser is not discharged but by actual payment ; or neglect or default of indorsee to receive in convenient time, which in foreign bills was held usually three days, and that it ought to be the same of inland ; but that this would vary according to the usage amongst traders, and the circumstances to be considered by the jury.

And lastly, that assignment of note payable to *A.* without the words " or order," charges indorser, and not the drawer. *Hill et al. v. Lewis. Salk. 132.*

Indorser makes himself liable in the same manner as drawer ; and therefore no need to aver that money was demanded against drawer or first indorser, in order to charge a second. *Harry v. Perrit, Tr. 9 Anze.*

On an action on a bill of exchange it is not necessary but rather superfluous to set forth the custom at large. *Soper v. Dible. Raym. 175. 8 & 9 W. 3.*

Note payable to *A.* or bearer ; bearer cannot maintain an action in his own name, because of the inconvenience ; for then any who finds it might ; otherwise of note payable to *A.* or order, for that is certain. *Nicholson v. Sedgewick. 9 W. 3. C. B. Raym. 180.*

Special custom of merchants ought to be pleaded on action on a bill of exchange ; otherwise of general. *Bellasis v. Hester. Raym. 280. 9 W. 3.*

Bill not indorsable of part without acknowledging satisfaction of the rest ; for a man cannot apportion a personal contract, to make a man liable to two actions, where by law he was liable to one only. *Hawkins v. Cardy. Mic. 10 W. 3. Raym. 360. Sed v. Wegerstoffe and Keene. Str. 214.* which seems to the contrary.—Before declaration of acceptance the bill was due, and evidence of acceptance after the day of payment. Plaintiff shall not recover ; for his evidence does not maintain his case. *Jackson v. Pigot. Raym. 364.* [540

Indorsee of a bill receives money for it ; this is a sale of the bill : But if he had indorsed it, he would have become a new security. *Governor and Company of the Bank of England v. Newnham. East. 11 W. 3. Raym. 443.*

Of days of grace, vide *Mutford v. Walcot. Raym. 574.*

No protest for non-payment before the day. *Anon. Raym. 743.* But for better security it may. If indorsee accepts the smallest sum from the acceptor he can never resort to the drawer. *Taffel v. Lewis. Raym. 743.*

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A foreign bill ought to be protested on the last day of payment; or if the last be an holiday, then on the second of the three days. *Ibid.*

Bill payable to *A.* or order held not a bill of exchange by Lord *Holt*. *Raym.* 757. *Clerke v. Martin*: But I take it this is not now held to be law, but the contrary.

A servant cannot receive a note instead of money, without his master's consent. *Ward v. Evans. Tr. 2 Ann. Raym.* 930.

A bill payable upon a contingency, not a bill of exchange; for to be a bill exchange it must be negotiable. *Vide Jenny and others against Herle. E. 10 G. Raym.* 1361. So if out of a particular fund. *Ibid.*

Promissory note to be accountable to *A.* or order, for 100*l.* value received, held a good bill of exchange. *Morris v. Lee. E. 11 G. Raym.* 1396.

So to pay 10*l.* value received of the premises in Rosemary-lane. *Burchell's case. Mic. 2 G. 2 Raym.* 1545.

Bill to pay out of fifth payment when it should become due held not a good bill of exchange. *Haydock and Lynch. M. 3 G. 2. Raym.* 1563.

Declaration need not aver that defendant signed the note [or bill.] *Elliot v. Cooper. M. 11 G. Raym.* 1376.

[541] Promissory note jointly or severally, in the alternative, held bad, *M. 2 G. 2. Raym.* 1544. *Neale and Ovington.*

What will amount to acceptance. *Wilkinson v. Lutwidge. M. 12 G. St.* 648.

A man cannot be sued here on acceptance of a bill of exchange abroad, after he has been discharged by the laws of the country. *Burrows v. Femino. M. 13 G. 2. 2 Str.* 733.

Indorsee indulges acceptor with time; This is at his own risque, and not of the drawer. *Gee v. Brown. Str.* 792.

Not necessary to aver acceptance of a bill in writing. *Erskine v. Murray. M. 2 G. 2. St.* 817.

Parol acceptance sufficient in an action against acceptor. *Lumley v. Palmer. M. 8 G. 2. Str.* 1000.

Acceptance to pay when goods sold held good. *Smith v. Abbot. E. 14 G. 2. Str.* 1152.

Acceptance to pay as remitted not good. *Bantury v. Liffet. 14 G. 2. Str.* 1212.

Indorser may be charged without resorting to answer. *Str. 411. Bromley v. Frazier*, and a very good reason given, that this seems to have been one of the ends of making them assignable.

Contempt

Contempt to take out execution both against drawer and indorser. *Windham v. Wither*. E. 8 G. 2. Str. 515.

The order of an indorsee may sue, as upon a general indorsement to himself. *Acheson v. Fountain*. 9 G. Str. 557.

Interest on bill not allowed without protest. *Harris v. Benson*. T. 5 G. 2. Str. 910.

Where a man has owned his hand to an indorsement he shall not set up forgery, by similitude of writing. *Cooper v. Le Blanc*. Str. 1051.

In actions upon inland bills, brought by indorsee against indorser, plaintiff should prove demand, or due diligence, to get the money from the acceptor; but he needs not from the first drawer. *Heylin and Adamson*. 4 Bur. 675, 678.

Evidence of custom receivable to explain doubtful law, [542] but not to countervail established. *Edie and another against East India Company*. 4 Bur. 1223.

Upon death of indorsee the interest goes to his executor. Vide the same case.

Bill of exchange forged and paid by drawer to indorsee, on valuable consideration, he cannot recover against indorsee. *Price v. Neale*. 4 Bur. 1357.

To ship fortune or bearer negotiable. *Grant v. Vaughan*. 1516.

Mortgage.

ON an application upon the seventh of G. 2. that upon payment of mortgage-money, principal and interest, proceedings in ejectment might be staid. Vide Herle's case, 1 P. W.

Against the motion—That this was a leasehold estate, subject to a bond debt, and considerable simple contract debts; which descended to executors holding from the mortgagor: And that, as in case of an heir who was liable upon a bond debt, applying to a court of equity for redemption, he would not be suffered to redeem without paying what was due upon bond as well as upon mortgage, principal and interest, so here, the court exercising under the statute an equitable jurisdiction, would not suffer the payment of principal and interest on the mortgage debt only to be good, so as to release from the mortgage without payment of the debt also upon bond. And that it is so in the case of executors succeeding a lessee.

The act of parliament of 7 G. 2. has a clause, that this power of the court of law, given by the act, shall not be extended

extended unless mortgagee gives notice of what he insists on. Application upon motion is not notice, within the meaning of the act.

The only case in a court of law was that in *Strange*; was that of *Stafford*.

Pr. Ch. 89.

Lord *Mansfield*—That is the very case in *Strange*. They don't take debt upon bond, unless against the heir; but no two characters can be more different than purchaser and heir. I don't see that case would decide on this; for they are very different.

[543] Mr. *Buller* further argued—That they could not see what was due.

Lord *Mansfield*—I suppose you have the title deeds in your possession, on the part of the plaintiff. Have you any case of taking debt against executors?

Mr. *Buller* said he thought the rule so general, that he did not cite.

Lord *Mansfield*—I believe so far otherwise, that it has many qualifications. What! take simple contract debts against judgment and bond creditors!

I *Peere Williams*, 777; was cited. [Which is the case of *Coleman and Winch*; and Lord *Macclesfield* is there reported to have said, that if testator, being possessed of a term, mortgages to *A.* and also becomes indebted to *A.* upon simple contract, and dies, his executor, bringing a bill to redeem, shall pay both the mortgage and the debt by simple contract, because the very equity of redemption is assets to pay simple contract debts.]

Lord *Mansfield* desired the case might be sent for out of Chancery. And, on looking into the case, he said it was confined to the instance of there being no creditors of a superior nature.

He added farther, that the court would say on what terms he ought to redeem; and the terms would be just the same as in equity.

Here is an attorney; the deeds are in his possession; the money upon bond; the bond, I think, he states to be for money lent to carry on business. Has the bill been delivered?

Enlarge the rule: Your debt is sufficiently secure. Let the executors make affidavit of the assets in their hands.

Mr. *Buller* desired they might know what past, or whether the whole of the premises was subject to the mortgage, which as executors they could not know.

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Lord *Mansfield*—They won't let you see their title unless you agree to pay the money.

Mr. *Buller*—That they might shew an abstract.

Lord *Mansfield*—You won't get that without agreeing to [544] pay.

If you find it was money charged for procurement of a mortgage, which was his own money, it will be very strong: It will be like the story of the man who charged portorage for the turkey which his client sent him as a present out of the country.

Insolvent Act.

IN a case of insolvency, Lord *Mansfield* said, he remembered Lord *Hardwicke* directed the city marshal to sell his place.

[So that it seems where places can be sold by permission they are to use their endeavour to obtain that permission, before they can claim the benefit of the insolvent act; for the act, it was observed, discharges them on these terms; doing all in their power.]

Information.

Libel.

UPON motion for an information for a libel published against the Hon. Mr. *Charles Fox*, on shewing cause to the rule, the printer declared he was not privy to the contents, nor to its being put into the paper; and was greatly concerned it should ever have been published, and stopped the sale immediately when he discovered it: And hoped, therefore, that the court would not grant the information.

Lord *Mansfield*—It goes for nothing, and would be an excuse for all sorts of infamy.

RULE ABSOLUTE.

Certiorari.

MOTION for a *certiorari* to remove an order of sessions, and an order of two justices confirming that order.

Objection—That it does not appear on the affidavits that application was within six months.

Answer—The justices are served with notice.

Rule to shew cause. But on its appearing by the affidavits that it was a rule to remove an order of the last quarter- [545]
ter-

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ter-sessions, and of course must have been within six months.

RULE ABSOLUTE *instante*.

Bail.

IN a case concerning discharge of bail the court was of opinion, that the bail never went farther than as a security in the original action. Therefore, when judgment cannot be opened in the original action, the bail shall not be liable.

In the case of bail above, though you declare upon the condemnation money, you never recover more than the debt.

Attorney.

MOTION, that attorney shew cause why debt and costs should not be recovered against him for neglect.

Mr. Justice *Aston*—We cannot make ourselves judge and jury: An action is open. We will not try it in a summary way, and take the decision of debt and costs in our own breasts.

Mr. Justice *Abbott*—If there were any thing corrupt, that might have been a ground: But it is in a jury's breast, upon the circumstances. Perhaps they would think the man who was sued was worth nothing; and therefore nothing to be got from him, and they might not make the attorney liable to the whole debt and costs.

Injunction out of the Exchequer.

IT was observed, that where an injunction is moved in the court of Exchequer, you may move to try the cause, staying execution till the merits of the injunction be determined.

Lord *Mansfield*—The general injunction in the Exchequer stays trial. And where the defendant is beyond sea, there, though his cause were ever so plain, the court of Exchequer granted an injunction till his answer came in. The exceptions to be sent to Rome, Grenada, or elsewhere, to be answered. And thus, where most ample justice ought to be done, in the case of foreigners, a man might be kept out of the clearest and plainest justice of the case. But of late years

years the barons, I believe, have corrected this. And now they will not grant an injunction in the case of a foreigner, unless upon hearing affidavits on the merits.

ON a motion to shew cause why defendant should not be discharged on debt and costs having been paid, and why a common bail should not be accepted.

Arrest on mesne process; and defendant contended that he had been arrested again for the same debt.

And that he is detained in custody contrary to an agreement of the plaintiff.

Contended on the other hand, that they were separate debts; for that he had assigned his effects to the plaintiff, and then the same day gives a warrant of attorney to confess a judgment; whereupon another creditor entered, and had execution of all the effects.

Mr. *Dunning*—That the nature of the proceedings shews the defendant is not under an arrest for the same debt; the one being a joint action, and the other a separate.

As to agreement—That on application at judge's chambers to be discharged, as having been twice under arrest for the same debt, he failed.

That the plaintiff has only got 500l. for 2,700l. and has no hopes of any further remedy, unless by keeping his security, and retaining the defendant in custody.

That the defendant is endeavouring to defeat all the ends of the agreement, so far as it was beneficial to the plaintiff, and to make his own advantage of it, without complying with the terms.

That all his creditors, as well as the plaintiff, would be disappointed; the assignment being for the common benefit of all.

That he should rather have moved to have discharged the rule with costs, but that the plaintiff was already creditor for so large a sum, and far from likely to recover the whole, much less costs: So that he feared that part of the motion would be troubling the court in vain.

Lord *Mansfield*—There is no dispute between the parties previous to this application, but upon delivery of the books. Another thing set up since is, defendant receiving the debt, [547] and ordering creditors not to pay. Now the only thing sworn to (farther than information and relief) is a single sum: And the ground, after all, on which they went was, that the books were not delivered according to the agreement. So says the plaintiff; and on the other side, the defendant

defendant says they were; but the plaintiff would not comply with the agreement upon the delivery up, and discharge him.

I think the plaintiff has been wrong. The defendant might have been obliged to ascertain the books by a schedule; and farther, to have delivered them upon oath. Therefore, upon delivering the books before master, upon oath, the defendant should be discharged out of custody.

Blandford *against* Frost.

MOTION to stay proceedings on a *capias ad satisfaciendum*, and that defendant might be discharged out of custody, for want of proceeding, within two terms after judgment.

This motion was grounded upon a rule, Trinity term, 2 G. 1. that prisoner, if not declared against within two terms, ought to be discharged; or if declared, and no farther proceedings within three terms; or if execution not taken out within two terms after judgment.

Like rule in the Common Pleas, 8 G. 1. twelve years after another rule to discharge from arrest.

Case cited, *Boulter and Salmon*, defendant superseded, for want of being charged in execution.

Contended, that no party can after a *superfedeas* be taken in custody, on any after judgment, by an action brought by the same plaintiff upon the former judgment. And that the practice was universal.

Mr. Justice *Aston*—That the practice, so far from being universal, the officer says there is no instance. And the two cases from the books go to the contrary. *Bonywell* against *Howlett*, 13 G. 2. never determined. Question, whether the body of the defendant was liable to be detained, he having been before in custody, and discharged out of execution. Justice *Lee* thought that his body should never be liable again. Mr. Justice *Dennison* doubted there being a judgment upon costs also, whether the court could prevent his body being taken in execution.

[548] I will consider of it.

Mr. Justice *Willes*—It seems to stand upon the same reason as a *superfedeas* before judgment.

Afterwards, on the 14th of May, in the same term.

Lord *Mansfield*—We have looked into this case; which was a rule to shew cause why defendant should not be discharged out of custody, &c.

In

In the case of *Wright*, administrator, against *Keswell*, a distinction is taken between execution upon mesne process, and after judgment. And the court, on the whole, thought defendant chargeable after a *superfedeas* upon mesne process; but not after final judgment was superseded.

Boulter and *Salmon*. There the case was exactly the same as in this case; but nothing done, because there was no application to bring him up.

Upon looking into the rule *Hil. 8 G. 2.* I think nothing more was meant than to prevent defendant being held to bail; because it provides for a common appearance to be entered.

In the case *Mic. 1745.* defendant was not charged in due time: And upon being discharged, question, whether he should be charged in custody upon action upon the former judgment. *Lee*, *Ryder*, and *Dennison*, thought plaintiff should not have the benefit taken from him: *Wright* otherwise; for so the Lords act might be evaded. Adjourned.

Str. 943. It appears no such evasion was allowed. But in the case in the year 1745. At nine o'clock, on the adjourned day, the court determined he might be charged in execution, having never been charged before.

Therefore, upon the authority of that case, and the sense of the rule, my brothers are of opinion that this RULE ought to be DISCHARGED.—*Quære amplius, amice lector.*

Mandamus.

[549]

ON a motion for a *mandamus*, to restore to the office of master of a free-school in Northampton.

The application set forth the manner of choosing, and that he was accordingly chosen, and had continued in the faithful execution of his office; and that he ought not to be removed, unless for fault or misdemeanor properly signified, and the removal thereon regularly made, whereas there had been no ground of fault or misdemeanor made out against him: And that he was discharged without any previous information or defence. And therefore he prayed of the court that he might be restored. Certificate of approbation of parents, and affidavit of a witness who did not approve the removal, and went away before it was done.

Mr. *Mansfield*, against the rule—That the ground made to the court to maintain the application for a *mandamus* to restore, rests only on the single affidavit of one of the burgesses.

That

That he does not shew he has a freehold in the office; nor what his title; nor whether removable at pleasure, or not.

That by the 14 & 15 C. 2. he should have subscribed a declaration of his conformity to the liturgy of the church of England: And on non-compliance the election is void, and he does not shew that he has subscribed.

And farther, that it appeared, on his own declaration, that he did not trouble himself about the school, which was not worth his notice; but for indulging a pleasure he had in giving trouble to those who removed him. And whether the court would allow him a discretionary means of indulging his desires on such grounds.

That if he obtained the *mandamus*, all he could get, as of right, was only 7l. 10s. *per annum*; all the rest depending upon the pleasure of the corporation.

That they discharged the precedent master at pleasure, and that they have always been so accustomed to remove. And if they might remove at pleasure, the court will find they had very good reason to exercise their pleasure in removing this man, and that he very well deserved to be removed.

The whole corporation, who were present, removed him, the person who joins with him in the affidavit only excepted.

[550]

They thought he was, as he had represented himself, a married man, about thirty; that, however, it turned out, upon his own confession, being charged therewith, that he was not a married man, but cohabited with another man's wife. And thus it is stated upon the order itself, whereby they remove him.

As to the certificates, it's sworn he told the people he wanted their names as a matter of form only.

[Lord Mansfield—I see one of them who signs the certificate is a markman; who gives his opinion of the proficiency of the children in learning.]

Argued farther, by the counsel against the rule—That he had set forth no proper title; nor did it appear his interest in the office was a freehold, or any permanent estate; but that the express contrary appeared by the affidavits on the other side. And that, as it appears by them, he is removable at pleasure; and that the court must see he grossly deserved to be removed. They will not, it is hoped, grant a *mandamus*, to which the return would be “he was not a proper person:” And no other effect could follow.

On

On affidavits it appeared, that one of the deponents, who swears he never saw a free-school where the children had made so little proficiency, asked the school-master, on whose behalf the *mandamus* was applied for, the reason of this. And that he said he did not think it a school worth his notice; and believed, should he be reinstated, he should not execute the office, as his only view was to give trouble to the corporation.

Affidavit of the burgesses, stating the constitution of the charity, and that the master is, and hath been always since the foundation of the school, removable at their pleasure. And they state the removal of the precedent master; and state the other facts mentioned by the counsel opening; and particularly that he wrote them a letter that he was a married man; but they say he cohabited with the woman, whom he pretended to be his wife, and then left her, and married another woman. And they say that they are informed, and verily believe, the pretended former wife was the wife of another man: And that it came out that she was not really his wife, and that she went off, on a quarrel, with an usher. And then they charge him with being addicted to tippling and low company, and telling extravagant stories, and talking so of himself that his veracity was suspected.

They speak to savings of an hundred pounds made to the charity, by refusing payments to a master who did not execute his duty; and an accumulated sum of 400l. which they vested in the funds, for the benefit of the charity. And that, for the better encouragement of a man of proper learning and qualifications to undertake the school, they had increased the salary, and enlarged the number of scholars from twelve to twenty-five. [551]

They state that, at a meeting of the corporation, he was charged by the mayor of these offences of tippling, keeping low company, being a romancer, and cohabiting with another man's wife; which last (and most material) charge he acknowledged; and endeavoured to justify himself from being a romancer: But a circumstance, they said, was related by one of the burgesses, in proof of that charge from which he endeavoured to clear himself, but gave no satisfactory answer, and was therefore dismissed by all the burgesses, except *Lloyd*, who made the affidavit in his favour, and went out before they came to vote.

That afterwards *W. J.* was duly elected, in his room, one of their body; a man of unblemished character, and of
Queen's

Queen's college, Oxford, as they are informed and believe.

Two of the burgesſes farther ſwear, that *R. B.* the ſchool-maſter, who applied for the affidavit, deſired an inſtrument might be drawn, to continue him in his office for a certain time. And that they told him it would not be permitted, but he muſt take it as his predeceſſors had done,

The mayor acknowledges *W. J.* above-mentioned was his ſon-in-law ; but ſays that he never uſed any influence in his behalf, to the beſt of his recollection and belief.

Affidavits of parents of the children, charging him with tippling and romancing.

Another, who believes he greatly neglected the ſchool.

Lord *Mansfield*—As to the objection on the ſtatute 13 & 14 C. 2. how does it appear he did not ſubſcribe ?

Mr. *Dunning* argued, that as a ſufficient ground of a *mandamus*, it was only neceſſary a man ſhould be removed from a freehold not competent to be determined by that removal : And then, whether in fee or for an hour, if that hour unexpired he ſhould be entitled to a *mandamus*.

Lord *Mansfield*—There is no doubt that is right. And I ſtopped Mr. *Bearcroft*, when arguing the neceſſity there ſhould be a freehold.

[552] It has been urged, the diſcovery of his cohabiting with another man's wife was made in Auguſt.

It is admitted that the diſcovery was made in Auguſt of his cohabiting with another man's wife, and that thereon in October he was diſcharged. If this be true, he was guilty of romancing, in ſetting himſelf forth as a married man when he was not, but lived in adultery with the wife of another. And with what authority could he talk to his boys of morality ? I think the giſt of their ground lies here : And I don't ſee why it ſhould go farther, if this be acknowledged, becauſe the only intereſt that can ariſe is from his character, and doing credit to the ſchool.

This will be an expence much greater, perhaps, than the whole property from whence the ſupport is to ariſe.

I underſtand the matter went back to be more fully answered by the party applying for the *mandamus*, and more fully ſtated on the other part : But I believe the court heard no more of it on the part applying for the *mandamus*.

Bribe.

Bribe.

IF I lay a wager of five guineas with *A.* that he does not vote for me, it is a bribe.

Borough of Portsmouth.

ON a motion, in the nature of a *quo warranto*, against several, requiring them to shew cause why they claimed to be burgesses.

Objections, that there was no sufficient majority to elect.

2dly, No summons.

3dly, That the day on which they were elected was a day appointed by the charter itself for other business, and not for election.

Mr. *Buller* cited the case of the King and the Borough of Radnor, where the court refused the information after seven years elapsed, on an objection taken by the presiding officer. The King and Borough of Malmesbury, on the objection being made by the town clerk.

On the other side—That there was no universal rule that the court should refuse an information because the person who objected was present and privy, and did not immediately apply. [553]

Lord *Mansfield*—The court has established, that after twenty years quiet and peaceable possession, they will not grant an information under their discretionary power. It does not bar the attorney-general, if he pleases. This was done by analogy to many other cases.

The time has been thought too large; and application has been made to parliament to narrow it: But the rule was not disturbed. In the case of the Borough of Winchelsea the court was struck so much by their going against a possession of thirty or forty years, that the rule was then established. But the court told the bar at the same time, that though this should be a bar, without any other circumstances, they would not say that, upon circumstances, they would not refuse the information within less time. No circumstances have been expressly laid down as a bar; but it depends upon a variety of circumstances.

A man shall not avail himself of an iniquity or blunder of his own. *Allegans turpitudinem suam* shall not be heard. Maxim.

Another

Another objection has arisen, by suffering a length of time to elapse, though under twenty years, when evidence might be lost, as in the case of residence.

Another, where there have been many derivative rights; and still more material where the overhauling proceedings for many years would amount to the dissolution of the corporation.

All or some of these circumstances have operated in the cases since that of *Winchelsea*.

Now let us consider the circumstances of this case. The person who gives the evidence does not come dishonestly to disturb the peace of the corporation: There is nothing before us of derivative title; there is no ground from the danger of the dissolution of the corporation; there is no difficulty to prove, as to any evidence of fact. As to the general custom, they may easily prove it.

It does not appear that the town clerk is interested in the election; it does not appear that he gets his intelligence other than officially.

With respect to the want of summons, there is no suggestion.

[554]

What is most material of all, the town clerk does not come as prosecutor: They introduce him as a witness.

Bail.

A Man brought up as an accomplice of felony, the principal not being taken, may be bailed.

Award.

A W A R D under general terms of submission; motion to set aside for a mistake.

Per curiam—That the mistake must be plain and gross, in order to set aside the award.

Trinity

Trinity Term,

[555]

14 Geo. 3. 1774. K. B.

ON a motion to stay proceedings on payment of debt and costs.

This was upon a bond entered into with trustees, under a very laudable charity, lately instituted for the loan of money to put out apprentices to small trades.

In trust to lend for five years upon bond, any sum or sums not less than one, or more than three hundred pounds, for putting out apprentices to small trades; one pound *per cent.* to be paid for the said loan for the first year, and two the four following.

Condition of forfeiture of the double sum in case any one of the sureties become insolvent, or the principal; or if he change his condition, and give no notice within a month: With divers other conditions.

The trustees sued for the penalty on this bond.

Lord *Mansfield* was of opinion, and delivered himself to the effect, as follows:

Though in common instances the debt is the substance and real demand, and the penalty only the security and shadow; yet here this being a regulation to secure the fund to a public charity, lending money on very kind and beneficial terms, for the encouragement of industry and advancement of young persons in trade, and by the smallness of the interest, and possibility of losses, the fund being likely, in its nature, to fail, were it not for the incidental aid of the penalties, the penalties themselves were all substance, and not form: And a forfeiture of the bond subjected to the penalties, and not to payment of the mere sum only; because these were special conditions, by which they received a special benefit.

[556]

Motion.

MOTION to enlarge a rule to the last day of term; not granted; but the court gave them leave to enlarge to the last day but two.

Error.

From the Common Pleas.

DECLARATION against a corporation, for not repairing banks, &c. of a river, as from time immemorial they had been used, and ought, whereby the course of the river became obstructed, and the plaintiff was obliged to carry his corn farther about. Second count charging as above, and that thereby he had not sufficient use of the navigation; *prout consuevit et debuit*.

Exception, that they have not stated the special injury by not repairing, which they ought to state, in order to entitle themselves:

A river certainly is as the king's highway: And so it is laid down in *Hawkins*.

Davies, 76. Every navigable river, so far as the sea flows, is a royal river, and the king has the fishery by his prerogative:

1 *Mod.* 105. Where the tide flows and reflows, it is an arm of the sea; and therefore common to all.

And vide *Salkeld*, [I suppose *Smith v. Kemp*.]

Vide Co.
Lit. f. 68.
5 Rep. 73.
Williams's
case, and 3
& 4 Com-
mentaries,
title Nu-
sance.

The plaintiff, therefore, has no particular right, in preference to other subjects. If this is a public highway, the plaintiff ought to have shewn some particular damage to himself, to justify his action. And for a common nuisance a man shall not have a private action.†

* On the first count, indeed he has stated a particular injury, in some measure, by alledging his being obliged to carry corn farther.

But on the second count, only that he has not had sufficient use of the navigation, as he ought to have had.

Carthens.

† Lex non amat supervacuum.

Fit boni judicis lites dirimere.

Expediit republica ut sit finis litium propter communem omnium utilitatem.

Trinity Term, 14 Geo. 3. K. B.

Cartlew, 130. *Paine v. Patrick*, for not keeping a ferry boat, as defendant had been accustomed, and ought of right to do, &c. whereby plaintiff lost his liberty of passage from such a time to such a time. Held, that no private action would lie; but that in such cases there must be a public prosecution by indictment.

Cra. Eliz. 664. *Fineux v. Howenden*. The principal case not determined: But a case is there cited of *Williams* and *Johns*, that where a chapel lies within a manor, and the parson of the adjoining church used to read divine service every Sunday, for the lord and tenants, in the said chapel, and had failed; and the lord brought his action on the case. Adjudged, that it lay not: For otherwise every one of the tenants might (severally) bring the like action, which would be inconvenient; but he ought to be punished by the ordinary.

5 Co. [which seems to be the case of *Williams* and *Johns*, mentioned by *Croke*] held bad, because not a private chapel for himself and family: For his tenants were not part of his family.

Obstruction of a watercourse, whereby he lost the use of his mill. Here it appearing that it was a public river, a private consequent loss will not maintain the action; but the loss must be immediate and direct.

Lord *Mansfield*—How do you prove this a navigable river? The water runs here into many people's cellars, but is that a navigable river? I don't see it's any where stated to be a navigable river. *Ex facto oritur jus*. Shew me upon the pleading this is a navigable river.

2d *Raym.* 1089. *Tenant v. Goldwin*. This case was cited as I take it, to answer the objection, that plaintiff had not shewn a title.

E contra, *Salk.* 360. [S. C.] If the hundred be indicted it needs not be stated how it is chargeable; but otherwise of a private person, who is not bound of common right to repair. And where defendant ought of common right to repair, plaintiff needs not to shew a title, nor to charge specially. Now here,* therefore, the corporation, who are the defendants, should be chargeable, especially as [558] not being liable to repair of common right.

Q q

Lord

* *Quære*, How this action was brought? for a corporation cannot be charged with a nuisance: And indeed, probably, the ground of the judgment might be in part, that the corporation, as being such, was not indictable of nuisance; and therefore the plaintiff must have his private remedy.

Trinity Term, 14 Geo. 3. K. B.

Lord *Mansfield*—They state, that from time immemorial they have been used to repair; which presumes an obligation to repair.

This is a corporation by prescription: And by the same prescription they are bound to do these things; and it might be the original condition of their existence. They must have had their existence as a corporation by charter; and prescription is evidence of what was in the charter, and does not now appear.

JUDGMENT AFFIRMED.

Error. From the Court of Common Pleas.

Harwood against Goodright.

MR. *Davenport* began with stating the judgment in the Common Pleas, and the special verdict, as stated above.

Error brought against the judgment, in favour of the lessor of the plaintiff.

This case must be argued upon two or three leading propositions.

1st, After a clear title, by the will of 1748, another good title is required, to take Mrs. *Harwood's* estate from her.

2dly, The mere act of making a second will does not, in itself revoke the first, unless by express words of revocation, or direct inconsistency, or repugnancy.

To prove this he cited the cases already cited and observed upon in the Common Pleas, *Cro. Eliz.* 721. *Cro. Ja.* 49. And the famous case of *Hitchin and Bassett*, as contained in *Cumberbach. Hardress, Siderfin, Salkeld, Modern Reports*, and *Shower's Parliament Cases*, 146, under the name in the last, of *Hungerford and Nesworthy*.

[559] That in this case a bill had been filed in the court of Exchequer, to remove an extent, whereon an issue was directed, and a general verdict found; with which the court was much dissatisfied. Afterwards, in the Exchequer, they did not find a devise of lands, and submitted to the court. In the King's Bench a special verdict was found: That he made a will, particularly stated, and existing; afterwards he made another will, in writing. What was contained in that will the jury know not. Determination, that finding a latter did not revoke the former.

That

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That even in Lord *Hale's* opinion it must appear a substantive independent will; that is, it must appear what it is.

A different disposition here is finding no more than *aliud testamentum* there.

Lord *Mansfield*—Were any of you here when it was tried before me? They gave evidence of a second will at Uxbridge. I left it whether the will was revoked.

No evidence, but a woman, who said she was subscribing witness; and a boy, who was present, he said.

His Lordship said he left it to the jury; if they found she had destroyed the will, they must presume the contents, and put it upon the others to prove the contents.

Mr. *Davenport* proceeded—They did not find that he did not destroy the will of 1756: They only find negatively, that they did not find he did. And if revoked, it would set up the former.

2d *Atk.* 272. That the statute was an express revocation of all other revocations, except express.

The first will must stand, either for the part unaltered, or for the whole, according to the construction upon seeing the contents.

The doctrine then has been, since and before the statute, that twenty devises of lands, by different instruments, might stand together, if not inconsistent.

The law must arise upon the facts found upon the special verdict simply. I have no conception of any arguments on the other side that will meet with these rules, or of force enough to over-rule them.

The first trial in the *C. P.* was before Judge *Blackstone*. General verdict as before Lord *Mansfield*, and they brought a new ejectment. On the verdict they declared themselves very desirous to have found the other way, but they thought the law too strong.

Lord *Mansfield*—This is the strongest verdict possible.

Have you considered whether upon a writ of error this court would grant a *venire facias de novo*? In the House of Lords they do: And I can't see the difference: (Two cases [560] were stated in which this was done, *Hafwell* and *Challice*, *Kynaston* and Corporation of *Shrewsbury*.)

The superior court upon a writ of error can do what the inferior court ought to have done.

Mr. *Davenport* continued—They should find whether this will was revoked at the death; the most trifling legacy would make it different *aliud testamentum* must mean a dif-

ference; if they had found she had destroyed the latter will, they should have presumed any thing, but they find nothing.

Mr. Justice *Aston* doubted whether there could be a *venire facias de novo*, and mentioned whether they might not try it by consent—but then he said there must be a new trial.

The evidence of a different disposition was explained to have been by parol testimony, as it came out before in Common Pleas; however she might expect all she was mistaken, there would be very little for her.

Argued, It was no evidence; he was a very passionate peevish man, and used often to say such things contrary to his express knowledge at the time.

Lord *Mansfield*—The question upon the special verdict will be whether the court will find for the plaintiff; it will not conclude them from a second ejectment.

It is impossible the House of Lords can do this, of ordering a *venire facias de novo*, if this court can't; because they send back the record, and make it a judgment of this court.

Stood over to the next paper day.

Serjeant *Hill*, for the defendant in error—Question whether upon the whole verdict taken together, there does appear a title out of the whole.

Special verdict was said to be too much; but the learned Serjeant said, he now thought there was too little.

1688, a private act of parliament for sale of the settled estates.

He was tenant in tail—if three sisters the whole to the three; if two 3000l. if one 4000l. if none survived then the whole in him.

[561] He would have been tenant in tail, reversion to himself in fee.

He was unmarried at the time of making the will; he had two sisters who would have had the chance of the estate if they had survived: He is styled of Lincoln's Inn from whence, if there are to be presumptions, I hope, may presume him a lawyer. Will stated in 1756, seven nephews and nieces in the mean time born. No alteration at all in his property; and then they find he did make and publish and execute another will in writing, with all the solemnities required by the statute. That the disposition made by the said *John Lacy* in 56, was different from the disposition in 48; but in what respects they are entirely ignorant they don't know the circumstantial difference.

Th

Trinity Term, 14 Geo. 3. K. B.

The circumstances of the family were necessary to be taken in; he had the absolute reversion.

The election whether the money should be laid out in lands or not was in him, *Leibmore v. Letchmore. P. Will.*

Lord *Mansfield*—It is very clear, except in the case of *Bowes* and Lord *Shaftesbury*, where the laying the money out in lands, would have defeated the whole intent, the devisee being a papist.

Lord *Mansfield* cited a case adjudged between Lord *Trelawney* governor of Jamaica and Booth. Booth wanted to borrow 500l. he borrowed upon a sum of 4000l. stock in Chancery to be laid out in land.—Lord *Hardwicke*, with the strongest desire to the contrary, declared it was land to all intents and purposes, and could not be liable to a simple contract debt.

Serjeant *Hill* continued—If it be to be supposed money, he had no real estate, except the estate in question the chambers. His will in 1756, was subscribed by three witnesses who duly attested the same; duly I suppose means, according to the statute of frauds.

Here then is a different disposition made of the same property.

The rules of evidence, notwithstanding what has been said, are not altered by the statute of frauds.

If she had it and produced it not, why this makes against her; if she had it not, why had she not, but because it was against her.

None need shew the contents, but those who claim under the will, which the heir does not.

The jury might have found generally for the heir, and [562] very reasonably I think: But they may find facts and leave the law to the court, who will find whether revocation or not upon circumstances, and even fraud may be presumed on circumstances.

Hardr. 218.

But I do not desire destruction or spoliation to be presumed: Your Lordship will presume the will is now existent; and without imputation upon the heir or plaintiff in error, be the accident what it may, the heir has no need of producing it; unless he were in fault by not producing it.

If nothing may be presumed, I think there is enough for the defendant in error upon the verdict.

Before

Before the statute of *H. 8.* there was no such thing as wills in this court,* except by particular custom: The notion and the word was borrowed from the civil law. The will therefore by the authority given by the statute must be the last will; and it has in such respects been interpreted with some strictness: *Habet* is a word used in it, and therefore a man can't, it is held, devise lands which he had not at the time of the devise.

The notion of the civil laws was that where there were two wills, the latter revoked the former; if the first was meant to stand, it was a codicil and not a will.

Swinb. 15. No man can die with two testaments, because the latter does always infringe the former; yet a man may die with diverse codicils.

Swinb. 501.

Perk. 478. A latter testament does always revoke a former.

In the books of civil law, *Swinburne* and *Godelphin*, are many cases improperly called exceptions.

The latter does not make void the former when the latter imperfect.

When the testator was compelled—

When by fraud.

When by undue influence.

[563] Where there are two wills and the testator takes up the first, and says that is his will.

When the second testament does not dissent from the former.

Where there are no executors for the latter, for then it is only a codicil.

Shep. 410. and this not only of chattels.

Parol revocations allowed in favour of the heir,†

Lord Hale, Hardr. 376.

That a devise of lands does import a revocation of a former will of lands. If he had been satisfied, it was a substantive independent will, he should have held it a revocation whether it contained a devise of lands or no. Now here it must be of lands.

There is no distinction between a man's will and the whole of his will; and then a second will is expressly and by necessity a revocation of the first.

Cra.

* It means in contradistinction to Chancery, where wills were considered as an appointment to uses binding upon the conscience.

† But not since the statute I believe and parol revocations in his favour, that had any obscurity or uncertainty have been disallowed even before.

Cro. Eliz. this is no judgment; and the case I presume to have been ended by arbitrament.

In our case now before the court—This is not a recent will, it was made at the distance of eight years, it is found to contain a different disposition; it makes the whole of his will; and therefore revokes the former.

If it revokes not the will but produces an uncertainty or obscurity, if this uncertainty or obscurity had been in one apparent instrument, what would have been the consequence? And what in reason should make the difference when upon two? One of the common cases a person is named, and two or three are of the name and description, they can't take, but the heir; though never meant to take.

No person in his conscience can say with certainty, Mrs. *Harwood* was entitled.

The case upon Sir *Harry Killigrew's* will I think, as far as we can see from the reasons and arguments, is in favour of the heir. The authority of the dissentient judge, and the importance and difficulty of the question, I hope, will give me your Lordship's pardon, for entering so largely upon [564] the case, and taking up so much of your Lordship's time, as I fear, I must.

[Lord *Mansfield*—We are very glad to hear you.]

Aliud testamentum is no more than *aliud* as to the form. It does not imply with certainty *aliud* as to the contents, I have brought down the cases upon all the reports.

Perk. 54. *Plow* 581. 4 *Rep.* 61. stated by counsel for the plaintiff, and she had said that the will being in writing the court will presume lands.

Finch replied, that as *animus testandi* was necessary to make, so *animus revocandi* was necessary to revoke.

That revocation was not *verbum artis*, so as to conclude from evidence on circumstances of their consistency; for the second will might be different and not of lands, and then even the civilians held it would not have been a revocation. 1 C. 291.

The court, I apprehend, held that if the devise had been of lands, it would have been a revocation.

The concluding reason is, it may be a confirmation.

I submit it cannot be here; if there is the least difference as to the property itself disposed of to Mrs. *Harwood*, the variation is fatal; and it cannot be a matter of form merely as alteration of a trustee, there was none in the first; there be no need of any in the second, without a total change in the beneficial interest.

What

What can they mean by different dispositions upon a general devise but a general difference?—Unless the following words be supposed to restrain, in what particulars they don't know; this only means they don't, who may be object, otherwise it would be repugnant.

Mr. Serjeant *Hill*, with an apology went into the evidence upon the trial—a subscribing witness to prove that the second will was long and the other short; and that the testator almost to his dying moment declared, the defendant should take very little: Then is there any thing to make it different from the cases of two persons one not meant to take, the other you don't know who, the heir shall take.

[565] General rules must decide upon property; and your Lordship will not depart from them, unless upon particular circumstances they would do an injustice. Can you do this by giving it to the heir who has no body capable of saying positively, in this case that their right is clear against him? But a degree of injustice must be done, and we know not to what extent, by giving the devisee under the first will her whole claim; who could never be meant to take entirely the same under the second, and might be meant not to take at all.

In one of the cases alluded to—devise not revoked, though the lease and inheritance were to commence at the same time; for it was only a revocation *pro tanto*, so as to post-pone the inheritance given by the first will, to the lease given by the second, and it was apparent it was not meant to revoke the former devise, other than partially: And therefore the court confirmed the former devise, so far as it was not altered: according to the meaning of the testator, apparent upon both the wills.

Here the will cannot be, I submit, of other lands, as in *Salkeld*.

No land at all—I have submitted in the beginning of the argument this cannot be here.

Lord *Mansfield*—You need not go through the cases as I went thirty years; the bar will take a note of them; and the court will go through them all.

You are right in saying this cannot be a total confirmation, or of no lands at all; there are some arguments in that case which do not tally with this.

Mr. Serjeant *Hill* continued—I see, next there is an argument upon the inconvenience and danger of suffering an existent will to be sworn away; which is the concluding argument. This might have been a very good reason at the

time

time of the trial, for admitting evidence with great caution : But it can be no conclusion against evidence upon the verdict ; and by the rules of evidence it may be taken as a deed lost, and proved in the same manner, and there was no demurrer at the time ; no point reserved.

The danger is an argument in all cases, and in order to avoid what was supposed fraud, the statute restrained the evidence that might have been given before ; but your Lordship will lay no farther restrictions than was then done ; your Lordship has observed that those restrictions have been of less service than expected : * Nor need there be the same evidence as of the attestation, one witness is certainly sufficient to prove the attestation ; and it will always be under the directions of the court, who will take care that no improper evidence be admitted.

* V. Wyndham and Chetwynd, 4 Bur. vol. 1.

Holt Ch. J. Devise of lands in *A.* afterwards another [566] will, and devise of the lands in *D.* That this was a revocation of the lands in *A.* but otherwise *Kinch.* And it was adjourned.

The inconvenience, if several dispositions should be made, by any whimsical notions or forgetfulness, of the same property, if the last be not a revocation of the first, they must be all proved.

For the defendant in error *Mr. Davenport*, in reply—*Cro. Eliz.* 721, was in ejectment strictly. In that case the testator's intent was plain, that the estate devised to his younger son should still go to the younger son, only letting in a devise to his wife, paying a rent to the younger son.

Cr. 49. shewed an intent that the son should have the reversion.

Devise in fee ; twelve years after the same land left to the sister, for fifty years ; the indenture delivered to a stranger, and not to be given till after his death ; and then the sister did not accept, but refused.

A devise to *A.* in fee, after to *B.* in fee, in the same instrument, is not a revocation ; but they were joint tenants. All the judges, but *Walmsley*, held it not a revocation longer than for a term.

Lord Mansfield—This is nothing to the case ; but it is clear when to a stranger, being inconsistent with the devise.

Mr. Davenport—It was only to shew the court would look into an instrument, to see whether it agreed with the former.

The court observed, that if in this case the second will had been brought before them, and it had been shewn that there

was

was a demise for five years to Mrs. *Harwood*, it would have stood upon strong grounds.

Serjeant *Hill*—Contents of a latter will unknown will not be a revocation of the former, I agree; but if any thing appears of difference, then it lets in the uncertainty I have objected. They argued in the court of Common Pleas as if the second will was supposed produced, though certainly not.

The finding some difference is no more than your Lordship would have presumed. How will this consist with what was so strongly relied on, upon authority of cases, that your Lordship will presume nothing, and must not see the evidence upon the circumstances, however strong?

[567]

That a negative found, that the defendant had not destroyed the will. This is not precisely so; they only say they do not find she did, which is as if they had said neither way.

[Lord *Mansfield*—The jury can't find a negative, unless such an one as is proved by an affirmative. One may justly say they have not said a word about it.]

Glazier and *Glazier* is clearly distinguished; because your Lordship cannot here presume the destruction of the second will.

It is said revocations are not to be presumed. It was never contended that they were; any more than disinheritances of the heir.

The title of the plaintiff in error, under the first will, is not subsistent now.

Shepp. 410. tit. *Testam.* 17, 18, and *Att.* may shew that before the statute revocations of lands might be by parol.

“It cannot be supposed the devisee of the first will would cancel the second.” Why so? Her case can't be better, it may worse, by the second. The heirs cannot be worse, it may be better. But it has been already admitted, that no presumptions are to be made, on either side.

It is the wise doctrine enforced by *Coke*, in his commentaries on *Littleton*, that the learning of the law is complex and linked together; * that by knowing one case thoroughly you will be led to the knowledge of many others. And Lord *Somers*, that this principle runs through all the books. And, in truth, the laws cannot otherwise be a science.

As

* *Scientia legis est complexa et concatenata;*

Tum denum vere decimus scire cum respon. casus invenerimus.

As to implied revocations, the statute has made no alterations.

Upon the words of the statute, which requires writing signed in the presence of three witnesses, in the presence of the testator, a writing with the requisites of the act would be good, as a revocation without containing any devise of lands.

The writing is found; the due attestation; and no cancelling to be presumed. Therefore the statute of frauds does not alter the case at all.

“ Presumptive revocations before the statute are now taken away.” They were taken away before as much as now. The only difference is, that the revocation cannot now be in words, without writing.

I have not designedly misrepresented any part of the argument. [568]

What my Lord *Crauper* said, in the case of *Onions* and *Tryers*, was in part disallowed by Lord *Hardwicke*, in several cases in *Vez*.

Lord *Mansfield*—We have no question upon it in this case. It is not an application to relieve in equity, upon an accidental cancelling.

Serjeant *Hill* continued—We have then moral certainty, not mathematical certainty, that the second will did not agree. The second is therefore a revocation, or necessary as part of the title. I am sure I have no objection to consider of a *venire facias de novo*.

Lord *Mansfield*—I have no doubt we can grant a *venire de novo*, if the case warranted; but I observe you do not pray, as holding the evidence upon the special verdict sufficient to defeat the title of the plaintiff in error.

Mr. *Davenport*—I hope the court and Serjeant *Hill* will excuse me for being short in my reply, as I was in setting out. The jury have professed themselves ignorant of the contents; I conclude your Lordship will not go out of the verdict, or know any thing of them.

I admitted before that there were three ways of revocation.

Express revocation by the statute.

Inconsistence of two wills.

Revocation by act of law.

The will, it must be supposed, the jury concluded to differ; because it was another, and therefore not a transcript merely.

I only

I only cited *Cro. Eliz.* to shew the court must see the contents, to see the inconsistency.

[562] It is then as in *Hitchin* and *Basset*, and the case of a will is not, as by the civil law, the substituting another to succeed in to the inheritance and rights of the deceased ; but it is an appointment of uses, which may be created to several persons ; and a revocation of any one shall not affect the rest : So that a second will not necessarily implying a general alteration, or perhaps any at all, as it may be of estates acquired since the first, or if of the same estates, yet not in prejudice of a former devisee, cannot operate as a revocation, till it be shewn that it expressly revokes, or is inconsistent ; and to revoke entirely it must be inconsistent throughout. But no inconsistency is to be presumed, or can be extended farther than it appears by conjectures on reason or probability.

If another will does not dissent from the former—is the sixth ground laid down by *Swinburne*.

It stood over for a third argument.

Lord *Mansfield*—It will be very proper to look into the history, and that case which has been decided.

I will state shortly what principally strikes me at present. Though as to personal estate, the law of England has adopted the Roman law, and the consequences of it, yet in devises of lands they differ. A will, in the civil law, is an institution of the heir ; in our law it's the appointment of a particular person as devisee to a particular estate : And upon that principle, before the statute of wills, when lands were devisable by custom, a man could not devise any which he had not at the time of making his will.

It's upon the same principles but carried too far by subtlety, that there have been revocations contrary to the intent ; where the testator has made a feoffment or the like, because he has made a new appointment.

With regard to land, a subsequent devise, must be inconsistent for a former devise, or the former must stand, unless expressly revoked ; and if it is an appointment to take effect at his death, and no contrary appointment, it must take effect.

If there be an inconsistency in part, this revokes as to that part, but no farther. If a man has given an estate in fee, and afterwards gives an entailed estate, or for years, in the first case it is a qualification, in the other an express revocation of the former estate ; because he evidently meant not to give him the same estate as before, but a different one.

What

What is the question upon this case? We are upon a special verdict; the argument is presumed. A vast deal has been said upon the verdict, and I can't think what was meant by stating the nature of Mr. *Lacy's* estate. We are to see the conclusions upon the verdict: The heir is entitled by descent; there is a will, which, as *A.* stood at that period, defeats his title; and then a second will, not known, or the contents: They do not find whether it was revoked, or subsisted to his death.

On the third argument, for the devisee, the plaintiff in error, it was argued—By the case of *Hitchin and Bassett*,^{1774.} even in the opinion of Lord *Hale*, a substantive will, unless it relates to lands, or appears to revoke, will not revoke lands. [570]

It might affect personalty, or realty, or the mode of disposing.

Mere evidence of a second will having been made does not revoke the first.

It seems the case of *Hitchin and Bassett* proves this, and agrees.

Civ. 51.

In wills, (before the statute) therefore, solemnly made, the revocation of them must be express, or the disposition absolutely inconsistent, or there is no revocation.

The statute requires that no will be revoked by intention, or construction, or verbal evidence, if not revoked by a solemn instrument in writing, according to the statute, or by another will.

If it be by a will, the will must be another, altering and disposing of the same property as the first, in a different person.

The disposition, surely, was not to the heir.

Upon the whole, is there any point, upon the circumstances, found in the verdict, taken together, which can amount to a revocation.

On the other side, for the heir at law, defendant in error—To be a good will, in favour of the devisee, it must be the last will.

The ancestor must have continued in this disposition of his property, so unfavourable to the heir, to his death.

With respect to the first will in this case, it's plain he did not continue in that mind from the making of the first will; for he changes his intent, and disposes differently by the second. And as a will once made is presumed to continue till the contrary is found, so that the first could not have been presumed

presumed not to have continued, had it not been for a finding which shews it does not, so the second will shall have the same presumption in its favour; or rather it shall not be presumed against its existence, and continuance to the death of the testator; it having been found to have been made, and nothing found to the contrary of its existence, once so proved.

[571] When a subsequent will is made, it has been held that it revokes the first of course; and it has been strongly argued, a general substantive will is a revocation. And of this opinion was Baron *Hale*. But this seems lost and overthrown by the decision of *Hitchin* and *Basset*. And the court must find a change of the intent.

In this case, as there was but one general devisee, why should the testator have made another will, if he had not changed the intent with respect to her?

But it's said the jury don't find this. They find that the disposition is different: To what persons in particular, or in what proportions he has given his estate, we don't know; but this we know, that whereas he had formerly made a will, and given every thing, within a few pounds, to Mrs. *Hurswood*, he has now made a different disposition.

It is said in *Hitchin* and *Basset*, that they held the second will no revocation, because it did not appear it was of lands.

In the case now before the court the attestation proves this:

There it was said, it might concern other: He had no other; for as to the 10,000l. three witnesses were not necessary; he being tenant in tail, remainder in fee to himself, might make the money, to be laid out in lands, to pass as money again.

2 *Peere Williams*, 271. And a man in such circumstances, I take it, may apply to a court of equity, and obtain, as of course, to have the money released, and to dispose of it not as lands, but money, since the whole interest is in him.

[Lord *Mansfield*—After he has made his election.]

Serjeant *Hill*—I think before he has made his election it is land to all intents and purposes.

Loan of money, where Lord *Hardwicke* determined that the money which stood as lands, under settlement, with limitation in tail, and a fee, expectant to the same person, were not liable to the loan, it being a simple contract, and the election not determined.

Lord

Lord *Mansfield*—This was a case where the person, whose representative refused to pay, had borrowed the sum upon the security of lands, declaring by letter he had money in Chancery to answer the debt. And yet they were considered as lands, notwithstanding this declaration.

Serjeant *Hill*—If the jury have not found that he destroyed the second will, they presume its existence; they will not find that he destroyed it.

And whether the will, if it should appear, and we could [572] know what it was, agree or disagree, since it does not appear, unless Mrs. *Hartwood* can shew it does not disagree with her claim by the former, which is now an imperfect title without the second, the heir shall take for the uncertainty; for he makes no title under a will, but takes by act of law, unless there be a clear title against him: And no party shall be obliged to shew an instrument to support his title, except he who claims under it. Now the devisee, who has no claim but by the last will of the testator, continued by him, in her favour, to his death, must shew, that a will, afterwards proved to be made, and which, *prima facie*, cannot be in her favour, (especially when she was general devisee of the first) did not defeat or alter her title: for unless she shews how much she can take, she shall take nothing. But the heir does not want any act of the testator in his favour, but shall take; often when there was the clearest intention he should not take, if that intention is impossible or illegal, or there is any failure in the execution of it.

The case in *Lev.* Tenant in tail devising in fee, suffers a recovery, and takes back an estate to himself in fee, with the express design of effectuating his will; this shall revoke it, and let the heir in to the estate.

It is not at all material whether the heir was named; nor even if he was expressly disinherited by the second will, unless that will can take effect; for he must take, unless somebody else evidently appears on the will. If one can suppose another devisee, but it cannot be told who that devisee was, the heir shall take. Suppose the lands given in mortmain to a monk, or to a papist, the heir shall take.

Gilbert. “I give all to my mother.”—This will not take from the heir; because it does not appear how, or of what estate the mother should take.

Suffer me to repeat, your Lordship cannot do an injustice by giving to the heir, who has a clear title, as heir, against a doubtful one; but if you give to Mrs. *Hartwood*, it will be against the right of the heir; and it must be concluded,

in part or the whole, against the intention of the testator. If he meant to give her the chambers, and the rest to somebody else, or the contrary, your Lordship gives her all, to answer the intention of giving her a part; and perhaps he might mean her nothing.

It cannot be a confirmation; for the jury have found it different.

Lord *Mansfield*—The subject is exhausted: It has been extremely well argued, and can admit of no new light.

[573] This is an ejectment brought for chambers in Lincoln's Inn, of which *J. Lacy* was seised in fee. He is also found by the special verdict to have had a reversion in fee, expectant on an estate tail in himself of 10,000*l.* remaining to be settled, in hands.

April 1748. A will was made, which is found by the verdict to be now existent, of all his real and personal estate to Mrs. *F. Harwood*, on payment of certain legacies. They find another will, duly attested in 1756, and farther say, that the disposition made by the said will of 1756 was different from the disposition of 1748, but in what particulars they know not; and *J. Lacy* died in 1767.

They find the title of the lessor of the plaintiff in ejectment, as niece and heir at law of Mr. *Lacy*.

On this special verdict each part says there is a clear title found. The defendant in ejectment says for her, as devisee, and the other part says there is a devise inconsistent or repugnant, or at least uncertain, on the finding, so that the court cannot give judgment; nor have either prayed for a *venire facias de novo*; which this court, as a court of error could have granted,

The court must conclude from facts found; they cannot find upon evidence. Presumption is a ground of evidence: That presumption cannot now be received, as being evidence, and therefore proper to have been found by the jury, not by us.

The jury have found this for the plaintiff; they have found her heir at law. It is rightly said, the heir at law, having a clear title, cannot be defeated by a presumption. You cannot guess him out of his title.

When there is a will, and you don't know to whom the testator has intended, you can't conjecture he meant to give from the heir. Something, therefore, must be found against his title, of the same certainty and clearness with that title itself.

What

What have the jury found to this title of the heir? A clear title under the will. No doubtful expressions upon the will: For if the will were not clearly intelligible the heir should not lose his right.

The heir then must repel this from facts, shewing this will to have been taken away; for the devisee's clear title, like that of the heir at law, must be taken away by as clear an one against her. And this title of the heir, or any devisee, against the first will, must have continued to the death of the testator: For it was lately determined, that where a will was made with express words of revocation, and that will and that revocation taken away by the testator, by the cancelling of the instrument, the former will revives. [574]

What is found in this special verdict? They say a clear devise of the chambers in Lincoln's-inn. In the case of *Hitchin* and *Basset* the jury say they do not find the testator devised lands by the second will. If the jury had not said it, the court would not have presumed it. And here, the court would not presume this different disposition to be of the chambers, if the jury had not said any thing; but the jury say, (because they know nothing of the matter, they say) that the disposition, &c. was different. If he had made a verbal declaration of the difference, this would warrant the finding of the jury, but could make no revocation, had it been ever so expressly said by him that he meant to give her nothing, or had given her nothing.

It is a different disposition distinguishes the finding from that of *Hitchin* and *Basset*, *aliud testamentum*. This must have been another will, differing in disposition, not on another piece of paper; for then it would be the same will. Neither can another will be a confirmation, for the same reason; because it must have some difference, to be another will; and if no difference it is not another will, but a republication.

A new will, or more properly testament, of personal estate, by the civil law, must be a revocation; because it carries with it the making of a new executor; and the making of a new executor gives him the residue, and puts him in the place of the heir. But a devise of lands, in our law, declaring the disposition the testator means to be made of his property after his death, is an appointment of uses; therefore must be of lands in possession. And it constitutes no universal heir; but there may be several devises, by several instruments, and of several estates, all of which may stand together. And this distinction is as old as *Plowden*.

Vide *Brett and Rigden*.

And because a testator can only devise such estate as he has, upon this legal subtlety, if he make any change in that estate, so as to make it another estate, in law, though with a design to effectuate his will, this is a revocation in law. The suffering a recovery by tenant in tail, in order to give effect to his will, and so expressly declared by him, was a revocation, because a change of the estate; but there is no ground contended of such circumstances here.

There is no revocation then; for I can't see any difference between this and the case of *Hitchin and Bassett*.

[575] The whole turns upon a fallacy, the ground of uncertainty. The case is, the heir shall not be defeated by any uncertainty: And when there is an uncertain devise to any other person, it is void.

But when a will appears certain on the face of it, this is as clear a title by devise as the other by descent, and must be overset by a certainty against it. And therefore, I think, in this case, the special verdict has not found a revocation; nor, consequently, a title in the heir against the devisee.

Mr. Justice *Aston*—I can add nothing to what has been so fully said by his Lordship, and am entirely of the same opinion.

The two other judges of the same opinion.

JUDGMENT of the COMMON PLEAS REVERSED.

Afterwards, on an APPEAL to the HOUSE of LORDS, JUDGMENT of the KING'S BENCH AFFIRMED.

[Note, A worthy friend, to whom I am in many respects obliged, has given me a note of *Glazier and Glazier*, which is alluded to in the argument, and seems to have been a leading case in the judgment; and I know not that it is any where reported, and therefore hope it will not be unacceptable here. It was thus; B. R. Hilary term, 10 G. 3. 1770]

This cause came before the court on a motion for a new trial, a verdict having been given for the defendant at East-Grimstead. In ejectment, and upon argument, it appeared,

That *John Glazier*, having made his will, devised lands to his first, second, and third son, and a pecuniary legacy to his daughter; but the girl soon after marrying, the father found it necessary to make some alteration in his will. He accordingly solemnly revokes his will by a subsequent one, which made only this simple alteration in the devises and legacies, viz. a legacy to the husband of the daughter.

At

Trinity Term, 14 Geo. 3. K. B.

At the old man's death the second will was found cancelled. The eldest son, therefore entered, as heir at law; against whom this ejectment was brought, by the advice of counsel, for the lands devised by the first will to the second and third sons.

Mr. Baron *Smythe*, before whom the cause was tried, was of opinion, that the first will being solemnly revoked, it could not revive without republication, by cancelling the second. And accordingly a verdict was found for the defendant. [576]

Upon a motion for a new trial, *Dunning*, solicitor-general, contended, shewing cause against a new trial, that the law was as stated by the learned judge. That to set up any other rule, would be to open a door to those inconveniences which the statute of frauds meant to guard against. That the will must be presumed to be cancelled by the testator; and therefore he was fairly taken to be dead intestate.

Lord *Mansfield*, Chief Justice—(without suffering the counsel to go on who were on the other side, contending for a new trial)—It's impossible this verdict should stand. The case of wills seems to be exactly within the reason of the rule relative to acts of parliament. If a repealing statute be repealed; by the repealing only, the first statute is revived: So a revoking will, by revoking or cancelling, revives the first revoked will.

Besides, if the cancelled will could never be given in evidence to establish such a will, (by reason of the cancellation) it cannot be produced as a revocation of the first will: So that, that will must necessarily be standing; and the plaintiff has a right to the devises under that will.

Yates, Justice—I am of the same opinion: There is a case of *Onions v. Tryers*, directly in point.

Aston, Justice, absent, as one of the lords commissioners in *cancellaria*.

Willes, Justice, concurred, *in omnibus*.

Corporation of Kingston upon Hull *against* Horner.

DECLARATION states the borough of Kingston upon Hull to be a very ancient borough: And that from and before 1772, to wit, from time whereof the memory of man runneth not to the contrary, the said corporation had been accustomed to receive, and of right ought to receive,
R r 2 a certain

a certain rateable toll, to wit, 8d. for every last of lead, and of some other articles, according to proportions stated in the declaration.

Entry on the corporation books as far back as E. 3.

[577] There was a great variety of evidence from the corporation books, &c. relative to the person appointed from time to time to receive the toll, and the payment of it.

Lord *Mansfield* left it to the jury, whether they would presume a charter, with directions that variance in the rating of the articles would not be an objection to the claim.

The jury found for the corporation.

On a motion for a new trial it was objected by Mr. *Dan-ning*, that upon the evidence the jury ought not to have found for the plaintiff; for that they were not warranted to presume a charter, as directed in this case; the institution of the corporation having been within time of legal memory.

2dly, Because the thing prescribed for was subsequent to the existence of the corporation, which was itself within time of memory; so that there could be no legal prescription.

That as to the case where a recovery was presumed, from a charge in an attorney's bill, it was nothing but evidence of surrender of tenant for life, for the purpose of making a tenant to the *precipe*. But a record and deed in *pais* are very different.

The case of the Earl of *Leicester*, I know not what it was.

[Lord *Mansfield*—If it was *Sidney* Earl of *Leicester*, they lost the estate, I think, for want of presuming.]

Besides these cases we were informed of an opinion, to which I shall always pay all possible respect and deference; something which has been said to have dropt from your Lordship at *nisi prius*, and other causes: Your Lordship will inform us of the circumstances of those cases, and therefore I shall not cite them. I only submit, that, as far as I have been ever able to learn, there have been no solemn decisions against us.

[Lord *Mansfield*—I remember, before our last *millers' rempus* bill was ever dreamt of, a case where long possession (suppose an hundred years) supposing the estate could have a legal commencement, though it could not operate as a bar might be evidence for presumption of title. And in the case of *Maidstone*, supposing the title could have a good and lawful commencement, possession of eighty years might be presumptive

presumptive evidence ; though no title is a prescription against the church, any more than against the king.]

Mr. *Dunning*—I did not maintain in the full extent that [578] a charter cannot be presumed, antecedent to the date of legal prescription.

The attention the law pays to the perishing nature of charters, however politic it might be if the law would extend it farther, descends no lower than 1123, the year of R. 1. accession. Till those to whom it belongs shall think fit to reduce the time, I apprehend the courts of law will not amend the law.

The cases before your Lordship might be where the whole field of possible time was open ; but here they must presume a title subsequent to the term of prescription.

A charter of confirmation is produced, which is a thing now considered not necessary in law, and yet the essential original charter is to be presumed lost, without proof that it ever existed.

At one particular period they use in their entry [this I think was 1681] the words, “ and the following rates added,” then certain rates are specially stated. They then thought themselves possessed of the legislative authority to add to the quantum or encrease the number of these tolls. If it shall appear to the court they have not better ground to go on for the tolls they now claim, I suppose the court will hardly aid them in this singular idea, whatever may be thought of the other point of prescription, which by this variance they seem to abandon.

But the corporation received a charter from *Charles* the 2d, which in consideration of repairs confirms the duties with certain exceptions ; if the corporation had been in possession of a claim without restrictions, would they have accepted one with so many such restrictions.

I conceive that no fiction of law will make merchants trading liable to these duties so varied, so different from the supposed authority ; and that this authority cannot commence by presumption in modern times.

Lord *Mansfield*—Had you inspection of all their entries ?

Answer—We had a certain confined inspection from the entry 1575, and a little antecedent, and some papers relative to their entries.

Had you any inspection of entries from 1441, and between that time to 1575 ?

Mr.

[579] Mr. *Dunning* in answer to this said—There was a book which he thought related to R. 2. written in court hand, but in very bad court hand, otherwise he said, he fancied it would not have been very difficult to him.

Lord *Mansfield* said farther, that great length of possession, though not operating within the statute of limitations, is yet strong evidence of a right beginning if there can be any.

It is very properly answered on your part, said his Lordship to Mr. *Dunning*, by observing, that not even the borough itself is a borough by prescription.

One ground supports the verdict, if any proof of it; upon which I have no opinion. The evidence is stated of a port before 5 R. 2. And if a port, and there were any duties, those duties must be in consideration of the port. *Sayrcriffe* was the name, *dudum* of what? Not the river, observed Mr. Justice *Ajlon*, but certainly the port.

Mr. *Dunning* contended—That the *Hull*, formerly called *Sayrcriffe*, meant the river of *Hull*, from whence the town took its name; and not the port.

Then said Mr. *Dunning*, as to the second ground, the presumption comes within very narrow limits—A very special kind of presumption; that there was such a charter between 1382 and 1441, and that this charter is lost, and the others are preserved.

[Lord *Mansfield*—Are the duties now in question of the same species with those granted by any of the charters?]

Note, I understand it appeared that as to most part they were; but not as to all.

Lord *Mansfield*—ordered to stand over till the next day, he being to go to the House of Lords.

It was further argued accordingly on the 10th of June, and Mr. *Wallace* contended, that a charter might properly be presumed in this case.

Impropriation presumed to have been made and the presumption taken within the reign of *Ed. 4.* Grant of the crown presumed within the time of legal memory, namely in the reign of *Ed. 3.*

[580] The possession appears to have been undisturbed for three hundred years; there is express evidence almost throughout that time, and implied evidence as to the rest, there being none to the contrary.

Will a recent addition of duties by the mayor and aldermen annihilate duties, to which they were entitled near three hundred years before.

He

Trinity Term, 14 Geo. 3. K. B.

He concluded with representing the ruinous state in which the harbour would be, if the court should determine no grant of these duties was presumable.

Lord *Mansfield*—I fancy Lord *Leicester's* case was, no recovery upon record to be found; upon asking the jury what they believed of the recovery upon evidence they presumed.

And this was *Grenville's* case, and the recovery presumed in the year 1700.

Mr. *Dunning* said, (as to the Earl of *Leicester's* case I believe) that the rolls were wanting during that year.

Lord *Mansfield*—That makes it a very clear case indeed.

Lord *Mansfield*—You know in the famous case of Lord *Purbeck*, they could not find the existent patent; but the entry was admitted as evidence upon an excellent speech of Lord *Nottingham*, though entry cannot create the title of viscount, though it might of baronet.]

King and Carpenter was cited of presumption, where the article affected by the presumption was introduced within time of memory.

Mr. *Wallace* again urged—That if the first proposition laid down as the foundation of his argument was right, that a grant was presumable, it ought here to be presumed; and the jury not to sit twenty-four hours longer without any prospect of new evidence, to try whether they could find a possibility to think otherwise. That if there ever was a ground of presumption there was in this case.

Mr. *Dunning, contra*—that he had nothing to add upon the case to the proposition, whether the grant, if it be presumable, ought to be here presumed.

As to the deplorable distress of their corporation and their all at stake, and they fighting *pro aris et focis*, if there was any truth in his instructions on the part of his client, the other undisputed tolls were twenty times more valuable, and adequate to the building and repair of the port. [581]

That this was not the first case of the kind that had been disputed with this corporation; for that there had been another contest upon tolls, only with different plaintiffs a few years ago; and they then put their right upon the charter of R. 2.

That it was not impossible on time given on either side to amend their case, that he thought a careful inspection of the books would produce something material.

It is also very extraordinary, that every reign has supplied charters down to *Elizabeth*; and yet this charter is unfortunately not to be found.

As to Lord *Leicester's* case, Mr. *Dunning* said he understood the decision had been about an attorney's bill, which gave evidence satisfactory in point of fact, if it had been competent in point of law. And upon inspection the whole rolls, either of that reign or of that year, were found wanting; that this was what had been represented to him, though he believed not by any body who had a very accurate knowledge of the case, and that, if ever looked into, he thought it would be found somewhat like this state of it, whether it were a *nisi prius* case, or more solemnly determined.

That he hoped, the more antient cases would be of still less importance as applied against him.

That the case in *Shower*, on a claim of coals imported, turned upon other points.

The first objection was, that in a *quo warranto* the crown is concluded upon the mere right; but upon an information not.

Another, as to the competency of the witnesses, for that on an hue and cry the hundred could not be witnesses.*

Nor for parish dues, parishioners.

Nor legatees of however small sums, witnesses upon wills. [It is usual now to release.]

Another, that a verdict in the case of a private person was not evidence against the crown.

[582] They came to the case by comparison of nuisances, with prescriptive rights allowed and recognized by law, and whatever within time of memory has been judicially, or by parliamentary authority, considered as a nuisance, fails of prescription, which must be an immemorial continued right uninterrupted, at least not otherwise interrupted than by wrong.† They find that in the time of *Edward* coals were complained of as a nuisance; they do not therefore think, there is evidence of an existent prescriptive right: Nor is there in that case any attempt to support the claim, by presumption of a grant.

The case in *Coke*, I think, will not disagree with my ideas, or with the cause shewn for a new trial, when I shew what I do admit.

I never meant to say, that grants of the crown were not presumable; for the law always founds prescriptive corporations upon presumption.

But

* *Testis in causâ sui privatâ non est audiendus.*

† *Consuetudo semel reprobata non potest amplius induci.*

But I only maintained that it was not competent to presume a grant, in a case where usage was not referred, or referable, to a time beyond memory.

The first case cited on the other side Mr. *Dunning* just spoke to, and then proceeded to the second, which he said was of much greater importance. Namely, supposing the crown when granting the manor was seized of the advowson, whether it should pass by a grant of the manor *cum pertinentiis*—that the court held not, and perhaps upon some old statutes.

[Lord *Mansfield*—I suppose upon the ground that the crown must grant by express words; for in case of a private person it would be acknowledged good.]

Mr. *Dunning* continued—That neither in this case last mentioned, nor in the case before, was there any thing to confine the presumption to a time within legal memory.

As to the charter of R. 2. that if the court could translate it as granting to a port then existing, all presumption would then be unnecessary and out of the question; the duties would follow of course, and be incidents necessarily carried with the port. But that considering the charter he could not, either in grammar or reason, think it less than a creation of the port. The king, speaking to the corporation, [583] declares—*concessimus quantum in nobis*; what is the meaning of this qualifying clause, if the corporation had at that time a port and the duties incident? He added, I imagine it was then doubted, whether the king could grant to others to make a port, though he could make one himself.

And besides the charter farther says, “*in meliorationem ejus ville, quod ipsi et heredes habeant portum*,” is it the phrase in granting an existent thing? *Concessimus portum* would have been intelligible; all the rest is superfluous; or contrary to the idea maintained against us.

I took notice yesterday, that the limits of the port were described by the charter, which would have been of no use if this was antient port.

Whether the port was created by the charter or not, Sayr-creek [or Sayrcriffe qu.] was the name of the stream which was called Hull, at the time of that charter.

If the corporation had the port before, could it have been *annexum ville* by the instrument? But if the crown intended an annexation in future, and the result of the instrument, then the court will see the crown had the erecting a port in contemplation, which, when granted, was to be annexed to the town of Hull.

Granted,

Granted, that they were to have a port *ita quod possint edificare domos kaias et staitbas*, these are things without which a port cannot exist—quays and wharfs; therefore they were to do what was necessary to make a port, there not having been one antecedently.

They were to this port, and to what purposes? *Ad defensionem augmentationem exendationem et salvationem villa predicta*. This was to be to the preservation and encouragement of the town, by giving them commerce, which till then they had not; and a port, which till then they had not.

They are to do this, which the charter authorises them to do, without impeachment from the king and his heirs; these words import not simply an authority to make a port, to raise staitbes and quays; but that the works of their own hands should be fully enjoyed by them, without any farther recourse to the regal prerogative; which would have been unnecessary and very unusual, if he had granted them a port already known and defined by certain limits.

Charter of 1 E. 3.—*quod concessimus in auxilium ville nostre predicta paviende*, a toll *de rebus venalibus ad eandem venientibus* without any distinction between alien or citizen.

[584] The goods are of various sorts; some by land, some by sea; some of this country's growth, some of foreign.

28 E. 1. No such word as port—no idea answering to importation; no such word as landing, or any word equivalent to any of these.

It is unaccountable how the word port should have escaped those charters if ever thought of, or how not thought of if there was a port before the time of R. 2.

In the charter of R. 3. it occurs very frequently when the port, by admission on all hands, did exist; and it would have occurred before in the antecedent charters, of E. 1. & 3. if the thing had then existed in the town of Hull.

This information convinces me, and will, I trust, your Lordship, that there was no charter granting duties antecedent to R. 2. because, I trust, it will appear, that the port itself did not before exist; and the difference of the words in what I conceive to be the charters antecedent and subsequent to its existence proves this.

E. 3. *Statutum de prerogativa regis*, if the king grants a manor and the appurtenances, the advowson will not pass; so in this case, if the king had the duties, which by the case before the court he neither had, nor could have in this case, they

they would not have passed by the grant of the port with its appurtenances.

Submitted farther, that the king could not have the duties, unless by act of parliament. That in the time of *James the First*, by the arguments of Sir *John Davie*, and *Yelverton*, it appeared, if it were decent to say it, where two so great men differed, that what are there called common law duties were never in the crown by common law, but arose by the statute. And Lord *Vaughan* says, he wonders how so great a man as Sir *John Davie* could doubt. Lord *Hardwicke* cited this case. *Vide Vez.*

12 Co. 34. Case of customs, subsidies, and impositions, Lord *Coke* refers to the statute 34 E. 1. *de tallagio non concedendo*, to *magna charta*, and to divers statutes and precedents in the books, expressly against new impositions by the crown. And by the statute of 7 R. 2. just after the charter now in question, *magna charta*, and the other charters of the liberties of the people, were confirmed.

There are many instances, in which the power of the crown is now understood restrained, in which it before was not so understood. There were in several borough towns prescriptions contrary to the natural * and civil rights of sub- [585]
jects, and detrimental to trade. These are not maintainable now, nor were three hundred years ago: There must be a strict prescription to support them.

It has been said (and if this had been a case where the crown might have had the duties in consideration of repairs, it might have been applied to this if to any case). It has been said, as your Lordship's opinion, that if there was a strict legal prescription, even an act of parliament should be presumed: But this would not be a case of such presumption; nor a case in which, I apprehend, the crown could have granted duties. The crown has the opening and shutting of the ports for the defence of this kingdom; but not to make gain of them: The one is protection, the other expropriation.

It was very natural in the time of *James the Second* they should apply, at that nice juncture, for new duties to be granted; when they might foresee their usurped duties were in probable danger of falling.

It was stated, that King *Richard* had the port and duties in fee: I insist that he never had the duties at all. If he had,
they

* There are natural rights, against which there cannot even be a prescription.

they must have been granted to the corporation, under the term profits or customs, or something implying a burthen to the subject and profit to the corporation.

I submit, as to the claim of duties, under this supposed prescription, that it was founded in usurpation, and could have no legal commencement in the time of *R. 2.* unless by strict prescription, or rights plainly incidental; neither of which, I contend, have place here.

Lord *Mansfield*—You go upon a ground which quite overthrows one of the points: For if this claim could never have a good commencement there could be no prescription.

Argument continued,

Paughan, 158. [*qu.*]

2d *Verz.* 621. Corporation of Exeter. My Lord *Hardwicke* says, “It has been doubted, whether the crown can have these duties, other than by an act of parliament presumed to be lost.” And that was the argument between Sir *John Davie* and *Yelverton*. If, then, the crown must have it by act of parliament, which must be within time of memory, how can a corporation or private person claim it by prescription?

[586] Mr. *Wilson*—That it was hardly possible to add any thing to what had been said: And therefore that he should only make an observation or two.

The presumption of a grant cannot be but where there is room for prescription, nor prescription within time of memory, he argued from 10 *Co.* 88. trespass. Justification under letters patent. The court would not admit the justification for failure of production of the letters patent; and there the danger is shewn of presuming a deed, when it might, for ought that appears, some way or other be apparent, if it ever existed; if shewn in evidence interlineations, erasures, or the like, might appear; or conditions or limitations on the deed: And it would be subversive of the true reason of the common law to let in such evidence of a deed. And that was a determination in which Lord *Coke* himself desires the reader to observe, that all the judges of England concurred.

Besides, the corporation have referred to their own ordinance; which they would not have done if they had known of a grant intitling them.

COURT

COURT—It is not an ordinance, but a list prescribed and set down. I don't, however, object to this observation; because they ought to refer to the original grant rather than to inferior evidence.

Argued farther by Mr. *Wilson*—That their petition to *Cromwell* proved they had then no such right: And if so, all antecedent evidence must be out of the case.

That the corporation would not be considered in the light of a private person, who, by accident happening in the family, might naturally lose the evidence of their title, without the loss being a matter of public notoriety, or even known amongst themselves, in a course of years after it has happened. That this was not the case of the corporation of Hull; and that in fact if they lost, as appeared, none of their other grants, how is it that they have lost this only? And still more, how can it be taken for granted, and with nothing but conjecture, that it ever existed? and that defeated by very strong presumption to the contrary.

[Lord *Mansfield*—The ground upon which this application has been made for a new trial (and which has been very ably supported) is this—that there was no title made out by the plaintiff, for the port duties, which ought to have been left to the jury: And if any part of what was left to the jury was not proper, to be sure a new trial ought to be granted.

1st, That there was a port existent before the time of *R. 2.* with the same duties; and to prove this they alledge, that if there was antecedently such a port in the crown, the duties might certainly be granted, and by evidence of usage must be presumed to have been granted from time immemorial. [587]

If this be true, there is an end of the new trial; the jury had that left them which was proper to be left.

2d, Supposing it to be clear that there was no port before the time of *R. 2.* and then an erection of a port without duties; it is contended, that the claim of the plaintiff's may be supported by presumption of a grant of duties between 1382 and 1441.

I meant to say when I began the single ground left to the jury was, whether upon the evidence they would presume such a grant between 1382 and 1441. If it had come out that there was no inspection before I should have ordered a new trial for farther light. On bare allegation where there has been an inspection, and you have not since the term desired to see the deeds, the court cannot take it up on a surmise

surmise of spoliation, they can only take it upon the judges report.

Now as to the charter of R. 2. From the year 1441, to the time when the question arose, there is very strong evidence (including a prodigious period of three hundred and fifty or sixty years) of these duties taken without suit or disturbance.

An hundred years ago 13 Car. 2. they apply stating they have a right immemorial which Charles confirms.

Another 4 J. 2.

It is said—"This charter relates to duties, and they lay "their claim by immemorial usage and not by charter." I am well aware why Mr. Wallace waived insisting upon the charter; because the grant founded upon such charter of R. 2. must have been within time of memory. But if the possession of the crown, and the title of the crown, be taken as the source of the grant; then it will be as a prescriptive right in the crown to these duties, and from thence derived to the corporation as claiming under that prescription.

As to the observation, that the difference of the claim was the ground, this makes no difference; they rest their title upon a prescription however they make it out.

[588]

Then we come to the charter: And it is so far from clear, that this was a creation of the port by the charter, that, if left to me, upon reading the charter, I should conceive the port existed before.

The water and the port are synonymous.

The port of London, the port of Harwick, go miles into the sea.

What is called Sayrcreek? The port: You cannot put another construction upon Sayrcreek, but as the name of the port. It could not be called Sayrcreek, meaning the town, in the 27 E. 1. where the name is Hull, and the town called *villa de Kingston supra Hull*; and yet it says, *adum vocat* Sayrcreek, that it was called Sayrcreek, a great while before, which the town was plainly not for the reason just given; but the port might. And the very name of creek implies something in the nature of a port, at least it does not imply a town. What sort of port, what trade or merchandize, what quays and staithes, in another question: Probably few, and of very little consequence.

Annexum villæ they had the port before, but now *habent portum in perpetuum annexum villæ*.

Other words support the construction rather than the contrary. They shall have the port "without the interruption

"tion

"tion of our officers and ministers," which was very important if the port existed before, and the king's officers had been accustomed to collect for the crown: But if the port had been then erected, it would have been understood that giving it to the corporation in *perpetuum*, would have been giving all that could pass by such a grant, severally and exclusively.

But there are other arguments, and some of them not without weight and force, to prove that the port did not exist before. There are arguments therefore of some consideration on both sides, to prove that it did exist before, and on the other hand that it did not. At least then it is doubtful; and if doubtful, what more proper to be left to the jury.

What evidence have they given? Above three hundred and fifty years usage, the strongest evidence possible.

Another question was made, whether the grant could have a legal commencement.*

If the question were whether such charter would support the claims as a grant in consideration to repair, I would take time to consider. It seems to be taken in the common pleas by all the judges;† and Lord Hale was cited *de jure regio*, ports are like markets; and the king may create ports and make a new grant of them; and authority cited of a grant 21 E. 1. to the Countess of Devonshire.—But without this there is enough left with regard to the granting or refusing of a new trial. [589]

All evidence is according to the subject matter to which it is applied. There is a great difference between length of time which operates as a bar, and length of time which goes in presumptive evidence of a right, still liable to be overthrown by contrary evidence, and not conclusive.

V. the S. P. resolved in C. B. case of Tyf- sen and Clarke *supra*.

If length of time is pleaded in bar upon the statute of limitations, the jury is bound by the bar; though they and the court are convinced in their consciences, the money was never paid.

The date of prescription is fixed (and was first fixed five centuries ago) from the accession of R. 1. but this will be sufficiently proved by the evidence of no person living, nor any written evidence running to the contrary: But any written evidence will go against this presumptive and implied prescription; but the positive strict and settled legal prescription; but the positive strict and settled legal pre-
Difference between positive prescription, and evidence of a presumptive prescription.

* Quod non habet initium non petitur finem.

† Qu. the case and time to which his Lordship refers.

scription will operate effectually in bar, be the title or the evidence which way it will.

No positive rule what length of time shall operate as a presumptive prescription. Vide Rex v. Stephens M. 31 G. 2. Bur. 343

Length of time with circumstances has no positive rule. Length of time is no bar in an action upon a bond; a great number of years without any interest paid upon the bond, may be a presumption that the bond was discharged by antecedent payment: But if the jury see on evidence that the man was not able to pay, or that he acknowledged the obligation within a recent time, the presumption is taken off.

A charter lost may certainly be presumed: I don't know that existent thing which may not be supplied by evidence.

—4.

Presumption, when the existence of a thing is proved, and the thing lost; presumption where the antecedent existence of a thing is proved implicatively, by the existence of something which could not have existed without it. Note, this is one of the ways of proving the highest, and most important and clearest of all possible truths.

A record (if you can shew it ever existed) and has been lost, you may supply it.

Suppose you cannot shew it ever existed; yet enjoyment upon a title, which could not be unless by the record, is evidence of the existence of such a record, to let the party claiming into the benefit of it as if it had actually been produced.

[590]

In Lord *Purbeck's* case there was no proof of loss of record. He sat in parliament as viscount, levied a fine of his honour as viscount, and enjoyed the title to his death as viscount. But there was no actual proof upon record of his peerage. It happened the argument was made unnecessary; for the patent was found: Yet that was only presumptive evidence, for the letters patent might have been never executed; and there are cases, within my memory, of patents granted and not made out, which did not bind the king.*

† called
Xal' avri-
Ceciv
the nullum
tempus act;
it appears

It would be very pernicious (especially before the late act † when no time was a prescription against the crown) that no presumptive evidence should be admitted in support of the title of a subject.

to be one of the instances in the present reign, where the crown has been pleased voluntarily to make a beneficial reduction of its prerogative.

There is a case of great authority in Lord *Coke*, determined by the chancellor, who called the judges to his assistance; and

* There is a very recent and melancholy instance, of a patent granted and not executed, within every ones memory.

and there is not a possibility in that case of the prescription having been before time of memory.

Grant of the manor of Kimbolton, *anno* 31 E. 1. The king was seised of the said manor, to which the advowson of the church of Kimbolton was appendant, and granted the manor, with the appurtenances, to *H. de Bohune*, earl of Hereford, in tail general. Tho' the grant did not pass, for the reasons there given, an impropriation is made, as under this grant, which must have been within time of memory; and resolved by Lord *Ellesmere*, and all the judges, that the plaintiff shall enjoy the said rectory, for though, by any thing which can now be shewn, the impropriation is defective, * for that the issue had nothing in the advowson to pass to impropriety at the time of his grant, yet that a lawful grant shall be intended for the ancient and continual possession; and that all should be presumed to make the ancient impropriation good, on account of the waste occasioned by time, whereby records, letters patent, and other writings, are consumed or lost. And it is observed in that case, that ancient possession would hurt instead of serving, if after the death of the parties, and a succession of ages, any objection or exception should prevail; which, if made in the life-time of the parties, might have been answered but at such a distance not.

Beadle
against Read
and others,
Hil. 4 Ja.

* The ad-
vowson not
passing by
the words
cum perti-
nentibus.

There is a case from the duchy of Lancaster, (I don't recollect the circumstances) where I left it to the jury, whether they should not presume there was a grant from the crown. I then thought it was a principle in law, that upon circumstances you may leave to the jury (and the case cited [591] is an authority) to consider whether they will presume a grant: and they will consider upon the circumstances, or a court of equity, if it properly comes before them; but here, on so narrow a compass as fifty-nine years, whether upon circumstances they should presume, would have been very proper to be considered by the jury.

Possession is very strong; rather more than nine points of the law. Very great strides have been made in favour of it: Some which Serjeant *Draper* has mentioned, of the presumption of a bye-law, invented to support usage which would not have been good without it.

To be sure, it was a great stride, when first introduced, to suppose there was immemorial custom that copyhold lands should be entailed, though, certainly, there was no such custom earlier than the statute of E. 1. but this was done in favour of possession: And it seems very dangerous to the subject, that there should be no presumption against the claim

Namely, by
2d West.
de donis
an. 13
E. 1. A. D.
1281.

claim either of the crown or of the church, be the circumstances what they may.

Upon both grounds, I think, it might be properly left to the jury. But I ground it principally upon the first, that there was an old port, formerly called Sayrcreek, with duties thereto belonging, before the time of R. 2. time out of memory.

But even was it more doubtful, I should be very unwilling to disturb a verdict, upon possession of 350 years. It is not conclusive evidence, and I don't think it's much to grant them the benefit of a verdict, subject to observations upon circumstances which hereafter may come out, and probably be in farther support of their title.

CURIA OMNIBUS ASSENSIT: Whereupon RULE to shew cause why a NEW TRIAL should not be granted, in the above case, DISCHARGED.

[592] [*Priddle and Nappiers*, 11 Rep. 8. Mic. 10 Jac. In attachment upon prohibition in the Common Pleas, the plaintiff declares against the defendant proprietor of the rectory of Tittenhul, in Somerset; and makes title from Robert Sherburne, and his predecessors in the Priory of St. *Peter and Paul* in the said county, as rectors of Tittenhul aforesaid; for that the said Robert and all his predecessors in the said priory being seised, and in possession of the said rectory and of twenty-two acres of land, as parcel and appurtenant to the same, in the right of his said priory, on the 20th of March 1530, the said prior with his convent did give grant and surrender the said priory, the said rectory, &c. and the said twenty-two acres of land to King *H. 8.* his heirs and successors. And that by force thereof, and of the statute of dissolutions 31 *H. 8.* King *H. 8.* was seised of the said rectory in his demesne, &c. as in right of his crown discharged of payment of tithes, and being so seised, conveyed the inheritance of the said twenty-two acres to Sir *Thomas Freke* and others; who *anno* 38 of *Eliz.* demised to the plaintiff for ninety-nine years, if three of his sons or any of them should so long live; and averred their lives, and that the defendant proprietor of the said rectory, sued the plaintiff for tithes of corn growing on the said twenty-two acres.

And defendant, *Napper*, alledged a grant, by letters patent of Queen *Elizabeth*, *anno regni* 2d, of the said rectory, to *Rive* and *Evelyn*, and their heirs, and by mesne conveyances to himself, the defendant in fee: Whereupon he libelled for the said tithes, as he lawfully might, with an
at/que

absque hoc, that the said *Robert*, late prior, or his predecessors, from time whereof memory runneth not, &c. held the said twenty-two acres, discharged of tithes. On issue joined the jury found a special verdict, in substance thus: That the prior and his predecessors, from time whereof, &c. to the dissolution, &c. were seised of the said twenty-two acres in their demesne, as of fee, in right of their said priory, and that one *Thomas* was seised of the advowson of the said church of Tittenhul, *jure prioratus*. And he being so seised, *H.* 8. in the twentieth of his reign, by letters patent of his special favour, certain knowledge, and mere motion, granted licence to the said *Thomas*, then prior, and the convent in his and their successors, to impropriate, consolidate, incorporate, annex and unite the said church of Tittenhul, and the same so impropriate, &c. to hold to their use, &c. charged with proviso to endow a vicarage, and a competent annual allowance for the poor. And that *John*, bishop of Bath and Wells, 4 September 1529, by indentures *tripartite*, inform as set forth by the verdict, did annex, appropriate, and unite the said church to the said priory, with the assent of the dean and chapter, party to the indenture. And afterwards the parson of the said rectory died, and *Thomas*, the said prior, entered, and was well seised of the said rectory, and of the said twenty-two acres in his demesne, &c. *jure*, &c. and afterwards the said prior *Thomas* died, and prior *Robert* succeeded him. And after the said appropriation ever held and had the said rectory, with the twenty-two acres in right, &c. and found the surrender. And that the said King *H.* by deed of indenture, as stated in the verdict, 24 July, *anno* 36 *regni*, demised the said rectory to *W. P.* doctor of law, for twenty one-years, who assigned to *Edward Napper*, and that no tithes were paid till the said *Napper* had a sentence in the court of audience, *anno* 2 Mar. *reg.* against one *Thomas Gull*, then farmer of the said twenty-two acres; and after the said sentence till the eighth of Queen *Elizabeth*, tithes were paid,—and convey the said rectory to Queen *Elizabeth*. And by the said letters patent and divers mesne conveyance to *Napper* to the defendant, and conclude in the usual way, praying the judgment of the court on the premises, whether the plaintiff or defendant have a better right.

Resolved, *inter alia*, that the information upon which the prohibition was granted was sufficient in matter; for although every parish church is supposed presentative, and the incumbent ought to come in by admission, institution,

and induction, yet the plaintiff, in this case, may prescribe that the prior and his predecessors, &c. from time whereof memory, &c. have been rectors; for that amounts that it was inappropriate: And the beginning of a thing before time of memory can't be known whether it came by union or impropriation. And therewith agrees 21 E. 4. 65.

And second, it was resolved, that an appropriation defective at common law, yet if the rectory was in reputation, appropriate, and so used, would pass to the king under the statute of 27 H. c. 38. or 31 H. c. 13. even though the statute of 35 Eliz. c. 3. could not aid it. And then the case of *Kimbolton* is cited, and 19 Eliz. *Dyer*, 368, where an appropriation under a grant of an advowson by a person only tenant in tail at the time of the grant, *videlicet*, 13 R. 2. was resolved by Lord Chancellor *Bromley*, with the Master of the Rolls, and Justices *Shute* and *Wyndham*, to be good. And note, there the presumption had its commencement thirteen years lower than here, in the principal case of the corporation of *Kingston*, and instead of 350, could have been but of 183 years continuance. And vide *Crimes* and *Smyth*, 12 Co. 30 Eliz. where the original grant had been on condition to endow a vicarage. Alledged the condition had never been performed; the court presumed the performance on the maxim, *ex diuturnitate temporis omnia presumuntur solemniter esse acta*. And note there was but 107 years.]

Crosser against Miles.

ON a motion to stay proceedings on payment of debt and costs.

Affidavit that defendant paid the debt and costs to a person who called himself the plaintiff's clerk, whom he understood authorized to receive the same, for the use of the plaintiff's attorney, in consequence of a letter which the said person brought from the plaintiff, with an account of the debt and costs, and desiring that defendant would pay the same: And that the said person accordingly gave a receipt for the plaintiff; notwithstanding which payment the action has proceeded.

Against the rule—The messenger sent is not stated to have intimated at all that he had any authority to receive the money. In fact, he was a man merely employed to carry errands, but, by his very appearance, so poor as not [594] likely to be trusted by any one as a proper person to receive money.

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money. And that the plaintiff intended only by sending him to give notice that he expected the defendant to pay in convenient time, either to himself or some proper person, but by no means to this errand-man. And that he never trusted him with more than five shillings at a time.

For the rule—That the money was in due course, and, according to the practice of law, paid to the clerk, (for such he affirmed himself to be) of the plaintiff. And that the plaintiff's attorney had so far acknowledged him to be his clerk as to call him a hackney writer, employed by him in doing business.

Lord *Mansfield*—Don't you foist in a preposition which is not allowed; that is, that the person was his clerk. If this was a person usually entrusted to receive money: But the person who sends swears that he never entrusted him with more than five shillings.

Mr. Justice *Asburst*—That it might be the ground of an action, if they could prove before a jury that he was a person usually employed to receive money.

The counsel, upon this, moved that the rule might stand till such matter was proceeded on, if any ground was found to proceed.

Lord *Mansfield*—This will not be allowed upon motion merely, without evidence that this person was usually employed to receive money. If either party suffers, on a mistake, they suffer hardly: The one, if this be taken as an authority, for giving it imprudently; the other if it be not, for paying.

The master says it is far from a general practice to pay debt and costs to the clerks. They don't usually do it for a sum of any consequence.

RULE DISCHARGED.

Knotting against Miles.

ON a motion to stay proceedings in ejectment till a sufficient person be appointed, who shall undertake for costs, the lessor of the plaintiff being an infant.

On the other side, it was contended, that the rule, instead of being made absolute, ought to be discharged with costs: For that where there was a real plaintiff in ejectment, no such application was ever made. Now here there is a real plaintiff, who appears to be husband to the mother of [595] the infant. The husband declares he is able, and will undertake to pay the costs.

On

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On the other side—That this was an ejectment to turn the mortgagee out of possession, without payment of his principal and interest: That at all events, the rule ought to be made absolute; because they might know that the plaintiff was indeed an existent person, and not ideal, as *John Doe*, or *Richard Roe*; but that it did not follow that he was at all more responsible.

Lord *Mansfield*—There is no ground: Here is a real plaintiff, and the rule was obtained upon a false suggestion.

Let it be DISCHARGED WITH COSTS.

New Trial.

Floyer *against* Edwards.

ON a motion for a new trial, upon special verdict.

Sale of gold and silver wire to the defendant by the plaintiff, who was a dealer in that business, and three months credit, the usual credit in the course of that trade, and with an increased price, if not paid within the time, amounting to more than the rate of five *per cent.* but not more than the ordinary rate in that way of business, upon non-payment at the time stipulated. The goods were not paid for at the time; and, upon these facts found, the question was, whether the contract was usurious, and therefore void.

Argued, that the credit being to stand enlarged as long as the money should be unpaid beyond the three months, the transaction could appear no other than a colourable contrivance to lend money on usurious terms.

Agreement upon an illegal contract is entirely void; and not only so, but usury by the statute.

Reynolds v.
Clayton.

* There
was no in-
terest then

that was legal; but interest above ten per cent. subjected to the penalty; interest under was liable to be forfeited.

Moore, 397, if one comes to borrow money, and the other says he will not lend, but he will sell corn, or the like, with an advance of more than ten shillings the hundred, which was then legal interest,* this is usury.

[596] Lord *Mansfield*—The case which you argued very well, (*Macey and Lovell*) about two years ago, was only from what time the action accrued, and agrees not with this. Can you make any argument in this case to shew the agreement is good, but there is usury beyond?

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Answer—No, my lord: If the agreement is good, I cannot establish my point.

Against the rule—The lender of the money might fix a price for three months credit; and if he was to give a doubtful credit beyond, might contract to receive an advanced price.

This is not an agreement for an usurious purpose.

It is a commission for *bonâ fide* sale of goods; it is not a pretence to cover a loan, upon usurious terms; for I admit the case cited by Mr. *Buller* to be good law, that being merely an evasion.

Here the contract gives the party an option to pay the money without any encreased use.

How many leases has your Lordship seen, *nomine pœna*, of twenty shillings or five pounds for every day's holding over and keeping back rent longer than the time.

The nature of usury is such, that it must be a certain compensation stipulated at the time, and which, by the agreement, must be paid by the borrower, at all events exceeding the legal allowance; not a contingent encrease, from which the borrower may discharge himself by payment at the day.

Burton's case, 5 Rep. [69. Mic. 33 & 34 *Eliz. B. R.*] The court, it being in the election of the grantor to have paid, and frustrated the rent, this is not usury; [vide also *Clayton's case*, the next in the book] but if it had been agreed, notwithstanding power of redemption, the money should not be paid at the day, this had been usury: For this had been an evasion. And no colour shall defeat the remedy of the statute; for the statute gives him an averment.

Cro. Ja. 509. Roberts v. Tremaine. A case put by Mr. Justice *Doddridge*. If I secure both interest and principal, and it be at the election of the party to pay within the time, and so avoid paying the encreased interest, this is not usury. *Hawkins's Pleas of the Crown*, 247.

Cumberbach, that where the party has his election to pay [597] within the time, but on failure he must pay such a sum, this is not usury, but *nomine pœna*. I admit this to be a *dictum*, but it is a *dictum* of Lord *Hale's*.

In this case the seller might have had his action at the end of three months, and have compelled payment; the buyer, at the end of three months, might have tendered the money, and insisted on its being accepted as payment, without being liable to the encreased sum.

Mr.

Mr. *Bearcroft*—That it was rightly said usury was a crime, and not to be presumed. Have the jury found it? If the substance had been usury, and the form a contract for sale, no colour, no contrivance, no shift, to use the words of the statute, shall serve.

All the trade in the kingdom is carried on by this kind of credit.

On the other side, in reply, Mr. *Dunning*—I had argued this was the case of all the trades on credit in this kingdom, because if this particular trade might do this, the rest might. I did not expect to be contradicted; for I knew it was impossible, upon facts: But I did not expect so candid a concession; from whence it will follow if this trade has done right, which hitherto has alone used this, and not without the exception of a person who said he thought the laws would not suffer him, and therefore did it not, all the other trades will do the same.

If the jury have not found what, upon evidence of facts, they should have found, this is a ground for a new trial.

This does not agree with the cases *nomine pœnæ*, because the recompence was certain.

The case in *Cro. Jac.* supposing the agreement lawful, is to secure a punctual payment, with a gross sum of 3*l.* as penalty, which will be the same whether the withholding be a month, a day, or a year.

But here is a sum accumulated in proportion to the time of withholding, and which accumulation is far beyond the proportion of legal interest.

That a penalty is a very different thing: For in the case of a penalty upon bond courts of law now relieve upon the statute, and courts of equity always.

[598] They did not mean by the original contract the payment should be regular: Why should they, when the seller could never get so much by payment at the day? And if the buyer had been likely to pay at the day, he would not have been entangled in such a contract. It may be said he might have paid at the day, but he had not money so plenty: The wisdom of these laws is the protection they afford to indigent men.

That an encouragement of usury tends to the encouragement of trade is quite a new proposition.

The court can draw no line; for sixty *per cent.* may as well be taken as six: And then too all the arguments might be used which are now used of the possibility of payment at the day.

The

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The question seems very short, whether there be any law against usury? whether it be founded in policy? and whether it be wise or proper in the court to repeal it?

Lord *Mansfield*—The statute against usury prohibits any man from taking, directly or indirectly, on the loan of money, goods, or merchandize, for the forbearance of payment of interest above five *per cent.* by the year; and so in proportion for a greater or less sum, and a longer or shorter time, all bonds, contracts and assurances whatever for payment of any principal or money to be lent, &c. upon any usury whereupon or whereby there shall be reserved or taken above the rate of five pound in the hundred, as aforesaid, shall be utterly void.

V. 37 H. 8.
c. 9. 13
Eliz. c. 3.
12 Car. 2.
c. 13
12 Ann.
st. 2. c. 16.

I cited the words on the prohibition and annulling cause, because it is upon a loan of money, or the like, where, upon the forbearance of the principal, more than five *per cent.* is taken. And the statute says directly or indirectly; and therefore you must get at the substance of the transaction. What is the commission? what is the intent?

You must come at the discovery; that it is borrowing on one side, and lending on the other. And then, if the substance be a loan of money, no contrivance in the wit of man, nothing applied to any appearance of sale, will allow the taking of more than five *per cent.* or support, from the penalty. And though the statute mentions goods or money, yet that was mentioned as the oldest kind of usury; but an annuity, or any other kind of invention, would fall under the same.

Mr. *Dunning* found it so material, that in his reply he called him the lender. How does it appear? It is in the course of trade, in a seller of gold and silver wire, otherwise a refiner. The borrower, as he is called, cannot justify forbearance upon demand a moment beyond the day.

[599]

Farther, it is not a contrivance. This is the constant usage of the trade; and so near universal, that but one exception can be produced; and that very exception proves the general practice: For the witness who said he took but five *per cent.* said that the rest of the trade were accustomed to take according to the rate here stated.

If an encrease of the sum to be paid, though made only on the contingency of the money withheld beyond the day, be usury, then the Bank of England, and all the merchants in London, are guilty of usury: For they discount at five *per cent.* but if not paid, they advance the money; not immediately, but upon the expiration of a few days it advances,
upon

upon a nice calculation, and would not have occurred to me if I had not been put in mind of it; but if this were usury, so is that.

Is this man a lender of money, under colour of dealing in silver wire? No such thing.

Is it worth any man's while; in truth could he live by his trade, if he took five *per cent.* instead of the money, to carry on his trade?

If the money was unpaid, there is no agreement for an hour's forbearance. "I have in view to get my money back in three months: If you don't pay me in three months you shall pay me an advanced price. I have given you three months credit for nothing: I don't choose to have my money unpaid; and will, therefore, have a sanction to enforce the payment."

How does it stand upon authorities? An actual borrowing of money with a penalty on forbearance is no usury, if the borrower can discharge himself by payment within the time. And that case in *Croke*, which says this is much stronger than this case, by the difference of the penal sum which is greater.

Not usury where it is in the election of the borrower, at the time of entering into the contract, to avoid paying any more than five per cent. by paying at the day.

In the case of *Hawkins* it is expressly, that where in the election of the person borrowing to discharge himself this is no usury. And so the other authority.

It is of great force to prove a contract not usurious, that it is in the ordinary course and practice of trade.

I rely most strongly upon the original contract being in the way of trade; because both parties will then take care that the terms be reasonable in the outset.

[600] The mischief is when there must a forbearance or the like, whether the borrower will or not, as a colour to draw more than the legal interest.

The mischief is, when on the very making of the agreement there must be a forbearance; which shews that the object was originally, not the sale of the goods, or security against detaining the money due, and not paying for them in a reasonable time agreed, but the credit given by a contrivance to raise an undue interest upon the loan agreed on.

Though it was very well argued at the trial and very ably since, I cannot help thinking the jury did right, in thinking the contract not usurious because in the course of trade; and

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and it was in the power of the borrower to have avoided the increased payment.

Nash *against* Cox.

MOTION for a new trial—Dealings between plaintiff and defendant concerning respondential bonds, the existence of some of which was out of dispute; but as to one its existence was disputed.

Amongst various other evidence the clerk of defendant was called as a witness, to prove that he had looked into his master's book, (which appeared to have been lost by an accident of the house being robbed) and that there were entries of a great many other respondential bonds but not his.

Objection to the *competency* of this witness in point of law, namely, that being agent to the party he could not be evidence in his behalf. The answer was—"you are very right; it is an objection generally: But there is no rule that does not admit of exceptions, and this is a case upon the circumstances which appears to have been a mistake; and it is evidence very necessary." On this evidence the jury found for defendant.

Mr. *Bearcroft* said he had taken a great deal of pains to get rid of his bias; he was of counsel for the plaintiff.

Lord *Mansfield*—Upon such a case it was not only your general duty but you were bound, whatever your private opinion might be, to move for a new trial. It is an objection of great nicety.

Mr. *Bearcroft* said, that at the trial he admitted it as evidence, if his Lordship thought it evidence; and that he believed, he added farther, that if it was evidence in any case it was not fit it should be left out in this.

Lord *Mansfield*—I left it to the jury that this evidence [601] was not legal evidence; I left it to them on the other evidence from other books on both sides; and you are always candid in complying with the justice of the case. But if it had been contended pertinaciously that such evidence ought not to be admitted, I should have told the jury that they would do right to presume, the party who refused to admit such evidence, felt it would go against him.

Mr. *Cowper*—That it was a very nice transaction and very dark, and of much importance; and no prejudice arising, except the farther expence, it would be very right to grant a new trial.

Lord

Lord *Mansfield*—If you had made any new discovery, or had a glimpse of new light it would have been a ground; but you had, or might have had inspection. And as in the case of *Hull*, if you had applied for an inspection the court would have granted it.

But what new evidence can come out? There is no certainty: It is upon conjecture; but they must find one way or other.

The rest of the court agreed that, in so uncertain a transaction, the point once settled by a verdict on either side ought not to be disturbed.

Larceny.

IF indigo be sold in the gross, and as such (the buyer choosing to have it in gross,) and be changed by the seller's taking part out and putting in indigo dust, though it be in his own ware-house; if after the contract was complete by payment, it appears that such taking is a felony, if the value taken be such as would make it more than petty larceny supposing it had been stolen out of the actual possession of the buyer. I suppose because the possession of the seller is the possession of the buyer after the contract is completed; and it was held by Lord *Mansfield* at *nisi prius*, and repeated in court, that such taking would be felony, upon occasion of evidence offered of this kind which Lord *Mansfield* held improper, (the action, I think, was an action of trover) because if it proved any thing it proved a felony. And the seller, I apprehend, cannot be considered as bailee of the goods, because they are not delivered to him by the defendant to keep or convey to him. And even if a bailee take part out, as a miller, who has corn to grind, part of the corn out of the sack with an intent to steal, it seems this hath been held felony; and so of a carrier taking part of the goods out of a pack; for such a special bailment of a part, distinct from the whole, was not given him. Though perhaps this latter reason when it was first introduced was a little refined and astute, if not over subtle in the case of life: But probably the ground of this subtilty was this, that if the whole be taken the injury is more apparent, and the direct remedy for the breach of trust easier; farther too, if the bailment is determined by the goods arriving at the place of delivery, though they be still in the possession of the bailee, it is felony if he takes them. *V. Wood's Inst.*
Title Larceny.

ON a motion upon a rule to shew cause why, on filing common bail, a writ of *superfedeas* should not issue on suggestion by affidavit, that the original debt was under £10l. but by costs was increased to 17l. and that therefore special bail ought not to be required.

To this it was answered that defendant agreed to pay debt and costs, and by so doing made the costs part of the debt, and was liable upon assumpsit.

Lord *Mansfield*—Can you turn a judgment debt into a simple contract one by the same person? If it had been a third person this would have a consideration.

But what was his promise? To pay a debt to which he was liable on record.

Answer—Not to the same sum.

Lord *Mansfield*—He is liable by the judgment to the costs. Rule discharged.

Mr. Justice *Aspburst*—This must be one thing or the other. Do you say by the promise the judgment debt is gone? Does it not remain still a lien upon the lands?

Doe on the Demise of Mears.

14 June.

E J E C M E N T T.

Special Case reserved.

DEMISE of a rectory by indenture for ninety-nine years if grantee should so long live.

The execution of the deed proved; but the subscribing witness did not see the money paid, the grantor acknowledged the payment.

Pleaded against the deed that the demise was fraudulent; and also that the defendant was guilty of non-residence.

In support of the first point, 13 *Eliz.* was pleaded to [603] avoid the transfer of livings by corrupt and indirect agreement.

Objected, that there was no corrupt agreement or indirect action stated.

As to the point of residence it was contended that the absence must be voluntary, and not involuntary.*

21 *H. 8.* on non-residence.

Moore

* *Necessitas excusat legem.*

Lex non cogit ad impossibilia.

Moore 343.

6 Co. 21. *b.* lawful imprisonment without covin, is a good excuse.

Now here the plaintiff is under sequestration, which is a good excuse.

Lord *Mansfield*—Why the sequestration is for the neglect, is it not?

Answer—No, my Lord, it's a process upon debt.

Sequestration not a legal excuse for non-residence.

Lord *Mansfield*—You have not stated this in your case, and sequestration is no legal hindrance from his residence, or serving the cure; only if he does not attend when the profits are taken away, another must be provided.

The absenting appeared on the dates afterwards in the case to be in 1770, and the sequestration not until 1772.

As to the absenting, *Bunbury* 210—11. and *Cro. Eliz.* were cited.

Lord *Mansfield*—It seems a very clear point; the only difficulty was, upon the state of the case it appears to be between two creditors.

JUDGMENT FOR DEFENDANT.

Moved, that the plaintiff may be non-suited.

Lord *Mansfield*—This follows of course; let a nonsuit be entered against the plaintiff.

[604]
14 June.

Heeling against Heeling.

CASE for certificate out of Chancery, testator, *anno* 1732, being seised of divers premises particularly stated, makes his will and devises all his freehold and copyhold estate in Essex to his wife, without impeachment of waste; remainder to his sons; remainder to his own right heirs in tail successively; the rest and residue to his wife. At the time of making this will he was entitled to the three-fourth parts of a copyhold in that county as mortgagee, which he purchases after the making of the will; and afterwards, in 1735, purchases another four-fifths of the same estate, and surrenders it to the uses declared by his last will and testament in writing. And in February 1736 he strikes out of his will a legacy to the poor of Hexham, and enters a memorandum, subscribed by two witnesses, that it was struck out by his the testator's order and in his presence, he having paid the legacy in his wife's time: Upon these facts the question out of Chancery was directed.

Whether

Whether any and what estate passed in the three-fifths of the copyhold under the mortgage, and in the other four-fifths since purchased, and to what uses?

Upon the argument of the case it was relied against the devisee, that lands could not pass by force of the surrender, to uses of a will made before the surrender and purchase. And 2dly, if the words of the surrender were proper, admitting that by proper words they might pass; next that the striking out the legacy after the purchase and surrender was no republication.

Lastly, that lands in mortgage at the making of the will could not be intended to pass in settlement, and therefore would not though after purchased in fee.

On the first point it was said in support of the argument against estates subsequently purchased, passing under a surrender made after the will, that if copyholds are to be considered as freehold, none can pass which were purchased after the will; for a will is considered as limitation of uses, and no man can limit an use which he has not.

Bunker and Cook, Salk. Fitz-Gibb. lands devisable by the custom, lands devisable *ut bon. et cat.* will not pass purchased after the will.

Cutter and Harrison, the will disposes of all his real and personal estate in the residuary clause.

In this case, surrender to such uses as he shall declare in his will. This, indeed, is speaking in the future time, but not improperly, perhaps, if the will be understood as speaking at the time of his death, the uses which should then appear to be declared; but nothing would pass which had been purchased after. If they can in any case, though subsequently purchased to the will, they will not pass under the words of the surrender.

[605]

There is no disposition in the will which must include these lands: The devises are in strict settlement, and cannot include after purchased lands, nor lands holden by the testator in mortgage. The rest and residue is to his widow; it may refer to that use: It is impossible to say to which use it shall pass. Nothing in the surrender distinguishes to which of these two different uses the surrender shall operate. Then the estates will descend according to the title stated.

It is stated, as to the second principal point, that after the purchase the testator struck out a legacy he had given to a charity, as having since the making of the will paid it. This cannot be answered till it appears what is intended to be

be made of it: as no case seems to go so far as to call it a republication.

On the other side, Mr. *Dunning*—I can put no other construction upon the words declared, or hereafter to be declared, than a provision for a will already made, and a will hereafter to be made. And the surrender will attach either to the past will, or to another, which the testator should leave as his last.

The testator, when he made this surrender, could not but know he had a will already executed; and by the surrender as fully connected the will with the surrender, and incorporated it, as if he had recited it. And then, if this will should finally be his will, when he came to die, then that the past; and if he made another, and left that, then the other so made should limit the uses of the surrender.

In the limitation of powers it is not necessary to refer to the powers. Can any man doubt, that even of freehold a man may so dispose that the use shall attach to a precedent will. If a man says “All the lands I have purchased, or shall hereafter purchase, shall go to the use of my will,” can they not? If in a conveyance he recites the intent to be to the use of a former will? Will this, or has it ever been held it would, exceed his power?

[606] The case cited was candidly acknowledged to have affirmed that a surrender may effectuate a past will, but that in the case there the surrender was not in such terms as could refer to a past will, it was to such uses as he should declare. This was a future will: And it was so expressed that it could with no propriety be applied to a will already made. And your Lordship only determined that, when a man speaks of what he shall do, he does not mean what he has done. The words are here declared, which is a recognition of a declaration of uses already made.

When it is said the uses are doubtful, it must be considered that these copyholds are in Essex, and this will refer to lands in Essex, and not to other devises not under that description. Your Lordship, as to the admission, will refer that back to the date of the surrender.

Lord *Mansfield*—This will do no good; these are certainly money: If it had been purchased it might be different.

Mr. *Dunning*—I alluded not as thinking it necessary to the case, but because it was a circumstance which the court of Chancery thought proper to be inserted.

As to the circumstance of republication, he adverted to his will, and shews he did by striking out the legacy he had paid in his life-time. Therefore he altered what he meant

to

to alter, and meant the rest should stand according to the present circumstances of his estate. And *Ver.* 230, observes that republications are very much favoured, and very slender evidence will do to support them. If this was slender, this authority decides the effect even of slender evidence upon that head: But I take this not to be slender evidence; for it is manifest by it that he meant his will to stand as it was, and take effect at his death (according to the circumstances at the time of striking out the legacy, as stated) in all respects, but for that devise, which was struck out.

1 *Roll's Abr.* 617.

The whole effect I contend for is upon the surrender, considering the will as incorporated with it; and upon that I most confidently rely the court will be of opinion for my client.

Mr. *Mansfield*, in reply—I submit, that the cases cited were not of lands. An alteration of a personal bequest, amounting to a republication, to support a supposed devise of real property, must be very new. But besides what is this? Does it make any alteration in the operation his will would have had if the legacy struck out had stood there, except only retrenching that legacy? Even a codicil, with three witnesses, has been held no republication. *Rogers and Gibson. Vezey.* “I desire this may be taken as a part of my last will,” yet no republication.

Lord *Mansfield*—Was this ever questioned? It is impossible to make a doubt. You don't state the case. It is *juris tritissimi*: There may indeed be a will so made that a codicil can have no effect upon it, as to new purchased lands. A man may make a will, and devise *A. B. and C.* a codicil [607] can have no effect upon this to pass a new purchase, not lying in *A. B. or C.*

As to the uses declared, or hereafter to be declared, Mr. *Mansfield* said it is mere form, put in by the attorney, or possibly by the steward, and no proof of his adverting to a precedent will, which is contended to be meant by the expression “declared.”

Lord *Mansfield*—If there had been no foreclosure of the equity of redemption, the mortgage would have gone to the widow. The money due was personalty, and the estate is a security, therefore it shews his intent upon the will, that it should pass when the will was made.

His Lordship gave the judgment of the court to this effect.

T r

The

The testator by his will, in 1732, devised to a number of uses; all the rest and residue to his wife, her heirs and assigns, and appoints her sole executrix.

Afterwards he purchases other copyholds, and in October 1735 surrenders to the uses, intents and purposes, declared, or to be declared by his last will and testament in writing.

In February 1736 the legacy to the poor of Hexham struck out, and a memorandum subscribed by two witnesses, that it was struck out by the testator's order, and in his presence, he having paid the legacy in his life-time. The question comes from Chancery, whether any and what estate passed in the one-fifth of the copyhold under the mortgage, and in the other four-fifths since purchased, by the will and surrender, and to what uses?

In this question, upon reading the case, I never had a doubt.

When a man, having made his will upon a subsequent day, republishes it, what is the consequence? That the property he is seized of at the date of the republication is as if he had been seized of it at the date of the will; therefore if the will be of *B. C.* and *D.* republication has no effect, as to other lands, because the will does not speak of any other lands.

The case in *Vez.* must be upon a question of a codicil merely of personalty. I have not had time to look into the case quoted as before me; but, as to surrender, I am quite of opinion as Mr. *Mansfield* says I was in that case. A surrender may be by reference, and every reference takes in the thing referred to, and the surrender is the form of conveyance. Here the testator, having made his will, and declared the uses of all his copyholds in the county of Essex, makes a surrender to uses declared, and to be declared, to cure the difficulty of lands after purchased, *verba relata inefficaciter videntur*. It speaks as if the lands had been purchased at the making of the will. As if it had been, "Whereas
" I have made a will, and devised copyhold lands in Essex
" to certain uses, I devise these lands in Essex to the
" same uses."

As to republication, it is unnecessary to the case, and it may be made a question whether he meant any more than to strike off the particular legacy, without intending any thing farther. Though, on the other hand, it appears as if he had a mind that in all other respects the will should operate as to every thing which he had at the time of the alteration made.

Mr.

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Mr. Justice *Aspburst* mentioned the case in *Vez.* alluded to, which he said was thus: He recited, "Whereas he had, by his last will, given a legacy, in trust to *A.* and another to *B.* he revokes this legacy, and desires this may be considered as a part of his will."

The reporter says that those on the part of the heir seemed to give it up, who argued against its being considered as a republication.

Action on Promises.

Set-off.

SEVERAL counts; for goods sold and delivered, work and labour done, and money had and received.

Plea of set-off.

It being in the case of a bankrupt, it was argued, that it is a principle, that a defendant owing money to the assignees of a bankrupt, cannot set off a debt due upon the estate of a bankrupt against the assignees, on the 3 G. 2. for all set-offs must be mutual debts, and the bankrupt cannot sue for a debt.

Lord *Mansfield*—Why?

To this it was answered, that upon the general doctrine it has been contended, (*Wilf.* 158.) that wherever there are mutual debts there must be mutual remedies; and the defendant can have no action of debt upon the bankrupt.

Statute 5 G. 2. That the commissioners may adjust the difference, and settle the balance. Debts accruing before the suing the commission are alone provided for by that statute, and not debts since.

Lord *Mansfield*—It won't do them justice: The assignees are the bankrupt. Except in cases where the statute interposes you can't bring your action; you must go before commissioners; the assignees are in a summary authority for the distribution and settling of the debts. [609]

It was a narrowness in the law, or rather in the determination of the law, that you could not set one mutual demand against another formerly, in common cases.

Mr. Justice *Aspburst* cited a case where the defendant gave notice of set-off against the assignees,

Mr. *Cowper* still urged, upon the second ground, that it was a demand of a debt due since the bankruptcy, which was therefore a debt due to the assignees.

Bankruptcy is in the nature of a civil death; the assignees are exactly in the place of the bankrupt. If the principle contended for were admitted, the bankrupt's estate would be increased by his bankruptcy, which the law will never allow.

2 *Vernon*, 173 (Qu. for there is no such case in that page). In the case of a bankruptcy, where there are dealings upon account, the creditor shall not be put to account.

Decet aliquid.

Lord *Mansfield*—Never trust any note cited, when not consonant with the general principles of law, justice, and equity—It must be wrong.

As to the debt due to the assignees since the bankruptcy, there was one of the counts charging before the bankruptcy; but argued on the general rule, that both pleas went to the whole declaration, and that the last was bad, being of goods sold and delivered to them, as assignees, since the bankruptcy, and would effectually vitiate the whole.

LEAVE TO AMEND the PLEA; both the pleas going to the whole of the declaration, and one being inapplicable.*

Curia Cancellaria. Baron Apfley Chancellor.

Jenkinson against Watts.

From the Master of the Rolls, in Form of an Appeal, but in Nature of a Re-hearing.

[610] WILL made by Mr. *Watts*; devise of capital mansion-house and estate, in strict settlement. Afterwards he makes a new contract with the Duke of Kingston, for Hansworth manor, and in Bucks, for 40,000*l.* codicil to dispose of the estates newly purchased to the same uses as those in the will.

After this, having the equitable estate in himself by the contract, he takes the legal interest to it by absolute purchase. And the question was, whether this was not such a change of estate as amounted to a revocation of the uses under the will.

For the appellants—This, if it be a revocation, cannot be express, but must be constructive. There are two sorts, one importing a difference of intent, from the circumstances of a new instrument made, though that instrument in itself void;

* *Quæras ulterius velim amice lector.*

void; or else upon reasons to suppose that the estate given was annihilated. The first cannot be the case here; nor most clearly can the second, in any propriety, be affirmed.

Montague and Jefferys, reported in *Moore*, which is the case of *Roll's Abr.* "None of the acts intended to complete, perfect, and carry into execution the intent of the testator is a revocation." The attornment of a tenant to another, for the testator, who had made a will; this, though it changes the estate, is no revocation; partition no revocation.

This, it is remarkable, was a trust strictly executory, as in the case of *Bagshaw and Spencer*: This was a trust to be executed immediately. The court would have considered the benefit of the contract as devisable, and would have executed it.

And a contract made by the testator would have been executed. 2d Chancery Cases, 144, *Prideaux and Gibbons*. *Amery*, the testator, devises all his lands to be sold for the payment of debts; the lands in question were afterwards purchased by him. And the court decreed they well passed; and that if a man devises lands after purchased, a decree should go for a sale for payment of debts. What Lord *Hardwicke* determined, as to change of estate operating a revocation, was law; but the *dictum* goes much farther, and is not, I dare say, in the register.

Lord *Nottingham* decided the case, that a trust for a particular purpose was no revocation.

Lord *Hardwicke* [*Parsons and Freeman*] said, that the same rule holds of revocation of an equitable interest as of a legal estate, and it would be very dangerous to property if it were otherwise. And that a trust for a particular purpose should be a revocation *pro tanto* only.

Trust executory is distinguished strongly by his Lordship [611] in *Bagshaw and Spencer*.

In our case what was done was a step to complete the purchase, as in *Parsons and Freeman*, *Sparrow and Hardcastle*. And it is like livery and attornment, and the other steps to complete the purchase.

3d *Atkins*. The principle on which Lord *Hardwicke* determined goes with us. He recognizes the case of *Montague and Jefferies*, and says it appears to him that *Roll* had a much better note than any of the other reporters.

On the same side, Mr. Solicitor-general—That this was a devisable interest, and was devised by the codicil in such a manner

manner as was sufficient to pass it. The only question therefore is, whether there were a revocation?

As in the case of *Elton* and *Harrison*, in the case before Lord Nottingham, upon appointment of a new trustee.

If it be any it must be a virtual revocation, *Lamb* and *Parker*. Virtual revocations must be by express implication.

Intention is leading upon all cases of revocation; and the court will require that *animus revocandi* should appear: And therefore a revocation, on the idea of a valid will made, which turned out not valid by the statute, was held to be conditional only. *Onyons* and *Tyrers*. [*P. W.* and *Vernon*.]

He directs payment of the purchase-money out of his personal estate, and declares the uses shall be the same as in the will.

The conveyance was no voluntary act, as that in the case of *Elton* and *Harrison*; but was an obligation upon him, which he was under a necessity to perform, when he made the codicil.

Mr. *Reade*, *contra*—We ground ourselves upon the saying of Lord *Hardwicke*, as is done on the other side, that the same rule of revocation applies to equitable interests as to a legal estate.

A great deal of doubt has been endeavoured to be thrown upon the construction of a revocation at common law.

Partition is only the possession of the same estate, in a more restrained degree. The parcener is seised *per my* and *per tout*.

[612] As to disseisin, it would hardly have been a doubt, if it had been considered that a disseisor has his election, whether he will consider himself as in his estate, or out of it: and by his entry he determines his election.

In the case of the settlement of my Lord *Lincoln*, the estate had been displaced in the settlement to an use resulting to my Lord *Lincoln* himself, in the usual manner; whereupon the springing uses which are limited in marriage settlements in general, upon a future contingency, were defeated.

An equitable interest was considered as a mere chose in action, so it was originally; but at this time it is deviseable, descendible, and indued with those other properties which belong properly to the legal estate.

And this court has so proceeded, and provided for what is originally called an equitable interest, and established a perpetual analogy between the legal estate and that interest.

As

As to the case in *Rolls Abr.* I can't help understanding the third *placitum* as repeating the law upon the second, with an express contradiction to it. The second case was of uses continuing as well after the conveyance as before, whereas the other was he had a legal estate not deviseable; afterwards he has an use deviseable by the statute.

It has been argued that a partial alteration of the estate would be a revocation only *pro tanto*. The case of *Coles* and *Hancock* was cited. There was an after-born son. In order to subject the estate to the will, the court decreed the deed should be set aside, upon the clear reason of insanity in the former part of the case reported.

It was said in this case there can be no possible argument of intention; whereas, in one of the cases cited by himself, the same learned gentleman takes notice the question was, whether a deed, made to give effect to his will by the testator, would operate as a revocation.

The purpose they have stated, of the intent (this was suggested *extr. caus.* to have been to avoid dower) is not evidence; and I only state it as a mark of their anxiety, and sense that if they can't rebut the evidence of a different intent, arising from a different disposition of trust, they must fall.

The will has particular trustees; these are changed by the deed.

The nature of the estate in equity is different: The estate in the contract was a constructive equity; the equity by the subsequent instrument was an express equity. [613]

On the same side, Mr. Attorney-general—It is the doctrine of my Lord *Hardwicke*, that where the testator does any thing inconsistent with or working upon the thing devised, this is understood a revocation; that is to say, a change of design, implying and amounting to a revocation.

Here the trustees under the will were necessarily the same under the codicil, as there was no new appointment of trustees in the codicil; therefore the conveyance must be change of design, as it introduces new trustees.

Swinburne 545. A testator devises a house, and pulls it down and builds another; the legacy is extinct, case mentioned of trustees by will to pay his debts, trustees to the same uses by his deed; this a revocation.*

The

* This case seems curious and extraordinary enough and worth looking into; if there were other legacies or devises surely it could not affect them; it

The reasons why a lease partition and the like were no revocations, is that a partial change of disposition went no farther than to import a change of intent coextensive only with that of disposition, and not beyond it, that is to say, produced only the effect of a revocation *pro tanto*. But the parting with the whole fee of a man, that is to say legal and equitable estate, is a revocation.

[614] Courts of Equity have in all cases of special purpose (and there is no difference in the rules of common law) determined, that the revocation was partial: Only so far as was necessary to answer the special purpose; but the change of trustees amounts to an intention of acquiring a new estate, and in the construction of law this is the effect: and if this seem artificial reasoning, and be therefore objected against, it is not to be wondered if this reasoning be applied in favour of the heir, who has a right to avail himself of every inaccuracy and breach of the rules of law, whether founded on principles of general reason, or particular and technical refinements, resulting from its peculiar principles of construction.

Mr. *Maddocks*—I cannot help quoting the sentiments of Lord *Mansfield*, *Swift* and *Neale*, 3 *Bur.* 391, where he says, constructive revocations against the intent ought not to be indulged; and some decisions of that sort misunderstood or over-strained, have brought a scandal upon the law.

On the side against the revocation, it was put in a very fair light by Mr. *Maddox*, if the appointing of new trustees argued an intention to alter or revoke the will, this is a revocation; was this, to which he was compellable, taking the conveyance and paying the money, an intent to set aside his will? But the same argument was attempted on the will of Sir *G. Amiens*, before the Lords Commissioners; there

it appears indeed clearly enough a revocation *pro tanto*; that is to say with respect to the trustees and *quoad* them merely. If indeed the object of the will was merely the payment of debts when new trustees were appointed, perhaps this was of a revocation; but yet not in the sense of letting in the heir: For the second will would operate in the place of the first, with the alteration only of trustees; as if the second trustees had been persons incapable. I should not have conceived, without express revocation of the former will, this change of appointment would have been so considered to revoke the former, as for want of its capacity to take effect to let in the heir: But rather that the first will would have stood which had taken means good in law to execute the same object. Whatever doubt this latter remark may have, there surely can be none that it must be very extraordinary if an appointment of trustees to pay, and afterwards new trustees appointed for the same end, be a general revocation of all parts of the former will.

there it was contended a legal estate acquired, after an equitable interest given by a will, would not pass; but without effect.

I will submit to your Lordship, that the construction upon equitable interests is in many palpable instances different from that in legal devises; but, admitting the proposition, how far will it go?

A recovery, a fine suffered.

A bargain and sale (not for money) though the uses are reserved to himself, is a revocation; but where is the case determined at law, which affects the case before your Lordship? none, but the case in *Roll's Abr.* This is not the case of a deliberate conveyance changing the uses; in this case here is an equitable interest at the making of the will; an equitable interest after the will; only the person changed who holds the uses in trust.

In a former case the court has held, where the uses were reserved upon the conveyance, and the same substantially continued only to different persons, this was not a revocation. Trusts, it has been often said, were substituted instead of uses, with equitable interests; this is the same case, and the change of an use in like manner would not have been a revocation.

I don't agree that a court of equity is bound entirely by the same rule as a court of law; which may understand itself bound by a case decided, though on wrong principles, rather than shake the precedent and introduce uncertainty.

A man at the execution of his will makes a mortgage in fee; the money is paid and he takes back the estate: It might have been a dangerous question at law, whether the new estate thus created would pass: [Qu. whether this or near was not determined in *Heeling and Heeling.*] And yet it would be very extraordinary if a court of equity should say, that if the money had not been paid at the death of the mortgagee it would have descended, subject to the equity of redemption; but as he has paid the money this shall be a revocation.

Lord Chancellor—This question, when first it came on, was treated as a matter quite of course; and to be sure it struck one very much, that when a testator, having contracted, makes his will, and afterwards, in consequence of some agreement, makes a conveyance to trustees in trust for himself, that the use should pass just as it would have done.

The case of *Elton and Harrison* struck me, and I desired it might be argued; declaring, I spoke no opinion, but only, as a question of some property, desired it might not pass over without argument.

The case is a very common one. A man having an equitable interest devises it by will; and afterwards takes back a legal estate; whether this shall pass or not.

In the case before Lord *Hardwicke* when it was argued, (*Parsons and Freeman*) Mr. Solicitor-General (now Lord *Mansfield*) argued, that there might be a difference between the construction of a legal estate and an equitable interest, —Lord *Hardwicke* in making the decree said, A doubt was made whether there might not be some difference between a legal and equitable estate. But I am of opinion the case would be the same; and it would be of very dangerous consequence if it were otherwise.

The question then will be—whether it would be a good devise of a legal estate; for, if not, I doubt very much whether the court here ought to decide it as good upon an equitable interest.

Mr. Solicitor-General very ably argued for his client, that the rule of law and equity went upon the same principles; and therefore this court has decided upon the spirit of that of the law.

A different disposition is to operate on the estate as a revocation *pro tanto* only, in construction of the law; and therefore this court, where the devise was of the legal estate, would preserve the equitable interest so far as was not altered.

[616] If this was an alteration of the entire equitable interest, I very much incline that it would be a revocation; and if no distinction could be taken from the case before Lord *Nottingham*, I should think so. And in *Parsons and Freeman*, the estate in trustees being altered by appointment of new trustees, without any particular purpose appearing, was held a creation of new uses, in such manner as to make a revocation.

In the case of *Rolles* it does not clearly appear whether it was by the direction or with the knowledge of the testator; and by every rule of law, if done without his consent, it cannot amount to a revocation.

It is very clear, where the equitable interest was in the testator, who after takes a legal estate, that such legal estate, annexing to the equitable interest, makes no alteration in the will, whereby the equitable interest has been devised.

Does

Does this come up to that? Upon due consideration I am very clear it does. Mr. *Watts* contracts with the Duke of *Kingston* for the purchase of this estate.

The vendor, in the eye of this court, is said to be a trustee; but not in the idea of trustee to create a revocation, by conveying the trust out of his hands into another's. He is only a person on whom the purchaser may call to compel a conveyance, and where a bill is brought for a specific performance the decree is, that he shall convey to the vendee, or such person as he shall appoint; what then does the vendor? No more than the court would have done for him.

It is exactly the case where a man makes a feoffment before a will, and makes livery after. This is no alteration of his intent; but only carrying the former intention into execution. The court, unless intent could be implied, will never deem it a revocation. The parting with the whole legal estate is a total revocation at law; the parting with the legal estate in part, is only *pro tanto*; but in equity the court here would consider it equitable and decree it a revocation *pro tanto* only, or no revocation, or total, according to the proportion of the equitable estate devised.

The argument is very artificial, that because he meant the conveyance should be first made to trustees by the Duke of *Kingston*; (who might have taken it in trust by the powers) and therefore in the mean while until the conveyance the appointment was in him, that for this cause the will of the testator is revoked, though the Duke is but the hand to hold the estate for the purpose of passing it expressly to the same uses; it seems therefore not to agree with the intent, and this artificial argument is sometimes used in favour of the intent; but hardly against it.* And if I understand right, it was not intended the Duke of *Kingston* should himself immediately convey to the trustees. Mr. *Watts* takes on the contrary the legal estate in fee, and the heir at law shall be deemed trustee for the devises. [617]

I am not sorry it has been argued; I am very much obliged to the assistance of my Lord Chief Justice with whom I have spoken and the very able manner in which you have all argued. The prayer of the appellants must be refused.

If I understood *Rolls* Abridged right, the last case put there was determined after the other.

Mr.

* *Durum est per divinationem tacitæ mentis a mente testatoris in verbis aperta recedere; durius etiam ubi neque tacita neque expressa mens.*

Mr. Solicitor-General—My Lord I rather believe they were neither determinations; but cases put and resolved by the court.

Costs.

MR. Justice *Willes* acquainted the court, that in case where he had doubted whether process in original, on which costs accrued, were a creation of a new debt, all his brethren informed him that it partook of the nature of the original debt.

COSTS out of pocket is a term for the largest costs.

Bail.

MOTION to discharge bail on the recognizance upon a commission of lunacy, which had issued against the principal.

Mr. *Wallace*—That this is not the case of a commission of bankruptcy; that it is not certain he cannot discharge himself: But if an *exoneretur* be entered, if he should become sane the next moment, the bail would be discharged for ever.

Lord *Mansfield*—There seems to be no ground. They have been at the expence of the commission; why does not the committee pay the debt? The debt must be paid out of his effects; it was one of the risques for which they had undertaken.

At this rule we should have sham commissions of lunacy.

[618]

Attorney

SHALL not be called “to answer matters of an affidavit” charging an irregularity but not a crime; for this motion is of a criminal nature.

Overseers.

ON a motion to set aside several appointments of justices, constituting certain persons named in the several appointments to be overseers in the borough of Bridgewater.

There

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There were counter appointments on one side; one appointment made on a Saturday at ten minutes after twelve, and half an hour after twelve another; and on Sunday evening and Monday evening two other several appointments at the same time respectively. On the other side they appointed precisely at twelve, and continued the appointment every minute till one; and at eight o'clock on Sunday morning another.

The appointments on the former side was made by the recorder and two of the justices; the latter, by the two others, justices.

Contended that the appointments on each side on Saturday after twelve, until one, synchronizing with each other; the appointment by the latter party at eight o'clock on the Sunday morning would stand; and that the case of *Milbourn port* was the same in material circumstances as this.

On Lord *Mansfield's* asking whether they went by the same clock, it appeared they went by all the clocks and watches in the town, according to their affidavits on both sides.

On the other side—that in the case of *Milbourn port* his Lordship determined that this raising on one another with appointments, was a prostitution of the office and a profanation of the day of the Sabbath.

Against this it was contended, that it had never been strictly said and laid down as law in any case, that Sunday was a bad day for appointment of overseers.

Swan and Croke, Error from the Common Pleas upon a common recovery suffered; by consent the error assigned was that the \dagger day of the return of the writ of summons was Sunday the 13th of May, 1750; on which day the tenant in tail male who was vouchee, died without issue male of his body. This seems to be Swan and Broome. Bur. 1525. [\dagger 619]

There were two points made in this case, of which the second in principle, though the decision was not on our side, the circumstances differing, applies strongly to the case now before the court, and applies *a fortiori*; it was—"whether by law a valid judgment could possibly be given on the day of the return, being Sunday."

In the judgment of the court it is there said, It is clear, if the court could not sit on Sunday, judgment could not be given before the death of the tenant in tail; for he died upon the Sunday. And then your Lordship decides the case upon the history of the law and usage as to courts of justice, that

that now they cannot sit on a Sunday. But your Lordship farther adds that antiently they did, and that it was the practice of the antient christians for the reasons there given, namely, amongst others to do justice to their brethren, and prevent their resorting to heathen judicatures where they must have sworn by idols: And in contradiction to the superstitious observances of paganism,* but afterwards restrained by the canon, (517) and extended to all other holidays and fast days of the church by the canon of the year 932. And that our Saxon kings received and adopted them, but that they were afterwards relaxed by the statute *W. 1.* [3 *E. 1. c. 51.*] And farther that writs were returnable on Sundays, and notice to appear on Sunday; and that the form still continues, though the true return and appearance is now on the Monday: And that Wakes were held on Sundays, until restrained by particular acts of parliament.

Now in this case of appointment of overseers for the benefit of the poor and parish, if there be no affirmative usage to appoint on Sundays, there is no usage to negative such appointment, there is no act of parliament against it; there is no adjudged case against it; and though courts of law do not now sit on Sundays, this is no reason why an appointment by justices of overseers should be void if made on a Sunday; and the act says generally the appointment shall be in Easter week, which includes Sunday.

Lord *Mansfield*—All I am thinking is how I can contrive for some-body to undertake to prosecute both sets of justices.

I don't know whether you would not have stood upon better ground if you had waited for a legal appointment on Monday, and suffered them to have gone against you by surprise on the Sunday. You would have had a much better foundation both for the appointment and prosecution.

The poor are sacrificed while they struggle.

[620] The behaviour of the justices is a shameful prostitution of their office for ill purposes; if one side had lain by it would have been much better. It is an horrible abuse, and I wish any could undertake to prosecute all four.

I don't know there is any case determined, that Sunday is a day for such purposes; the act appears to exclude it by saying it shall be in Easter week or a month after, which seems to

* Though this contrary extreme was likely to produce no less dangers of its own unless it were merely temporary, and perhaps it was never very general amongst them.

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to exclude Sunday; for Easter week does not begin until Easter Monday; and the general reasons given by Mr. *Hodgkins* go strongly against it.

I will not give my sanction for such an act to any of them. It is all Sunday employed to fraudulent purposes.

Let all the appointments be set aside; and let a *mandamus* go to the justices to make a new appointment, and give notice of the time and place of making the appointment; two days notice to be given by the mayor to the other justices.

Suggested that one of them lives twenty miles from the place.

Lord *Mansfield*—Then I will shorten the notice: For I had rather he was not there—a man who comes for such purposes! Let it be one day's notice.

I hope the note-takers will observe the appointments were both bad, and not determined by the clocks.

Justice of Peace.

A Man who acts as attorney, is not entitled to act as justice of peace. Vide 5 G. 2. c. 18. s. 2. but by the words of this act does not extend to charter justices.

Judgment.

ON a motion to set aside judgment upon a warrant of attorney, upon the ground that the person was in custody at the time of signing the warrant, to confess judgment; and that no attorney was present on his behalf at the time of the said signing.

By rule, E. 15 Car. 2. B. R. it is ordered by the court, [621]
“ That no bailiff nor sheriff's officer shall presume to ex-
“ act or take from any person, being in his custody by
“ arrest, any warrant to acknowledge a judgment but in
“ the presence of an attorney for the defendant; which
“ attorney shall then subscribe his name thereto; which
“ said warrant shall be produced when the said judgment
“ shall be acknowledged. And if any bailiff or sheriff's
“ officer shall hereafter offend, or do contrarywise, he shall
“ be severely punished for so doing.”

And it is farther ordered, “ That no attorney shall enter
“ or cause to be acknowledged or entered, any judgment,
“ by colour of any warrant gotten from any defendant be-
“ ing under an arrest, otherwise than as aforesaid.”

S. R. in C.
B. Hil. 14
& 15 Car.
2.

The

The defendant in this case, who entered into the warrant to confess judgment, declared, upon his own affidavit, that he knew what it was, but did it because it would be void.

It was argued, that the court had been so anxious to secure this benefit to the defendant (which, to be a benefit, must be certain and general, and not to be limited by circumstances of what a particular defendant might or might not know) that by a rule of 4 G. 2. the court, apprehensive that the former rule might be so construed that the plaintiff's attorney might be thought sufficient, provided that, for the future, none should be good unless an attorney named by the defendant was present, and signed.

No rule or statute shall be suffered to be an instrument of fraud.

Lord Mansfield—I shall say to the rule what the court of Chancery said of the statute of frauds, that no rule shall be made an instrument of fraud; nor employed contrary to the ends for which it was made.*

This rule was made to prevent fraud by the defendant, otherwise ignorant or fearful of the plaintiff, being drawn in or terrified to confess a judgment; and therefore has admitted of many exceptions on the circumstances: As in the case where a man in prison at one man's suit executes a warrant to confess a judgment to another; this is within the letter, but not within the intent of the rule.

[622]

The court will never suffer this rule should be made an instrument to cheat the plaintiff; which was introduced to prevent the plaintiff from cheating the defendant, or by any undue influence misleading or overpowering him. He knew the nature of a warrant of attorney; he was privately reminded of the consequences; he has the effrontery to set before the court, upon his own affidavit, that he knew that the warrant would not be good, being executed without his attorney being present. I am not at all afraid for the rule; for this will be a precedent only when it is applied as an engine of fraud, to subvert that justice which it was made to defend.

Mr. Waller, in his defence before the House of Commons, explains the precept of the Bible, "Thou shalt not see the a kid in his mother's milk," thus—You shall not turn what was designed to support and benefit mankind into their destruction†. Therefore the court will never suf-

* Frustra legis auxilium implorat qui legem ipsam subvertere conatur.
Ratio est anima legis.

† Leges in bonum & salutem hominum nata pessimum est in fraudem & perniciem hominum converti.

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for a rule introduced to prevent fraud to be applied to the purpose of effecting it.

Archbishop of Canterbury *against* House.

Administration Bond.

ON a motion to shew cause why proceedings on administration bond, sued in the name of the archbishop, should not be staid, with costs to be paid by the defendant.

The defendant, a creditor, obtains from the proper officer of the bishop authority to sue in the name of the bishop on the administration bond, on suggestion that the estate of the intestate was not likely to answer the debts; that his widow, the administratrix, was going to abscond; and that she had not given in a true and perfect inventory.

The objection was, that it was not competent to the bishop to give his name at the instance of a creditor.

Secondly, that if it were competent, they have commenced proceedings in this cause without authority from the bishop.

Lord *Mansfield*—Surely it is competent for the archbishop to grant, at the instance of a creditor, where the executor has not delivered in an inventory, or has delivered in a false one.

28 June, 1745, *Greenside and Ward*. Bill to be relieved against a bond given to the commissioners of the ecclesiastical court, and in favour of a creditor, for want of a complete inventory. The bond was maintained by my Lord [623] *Hardwicke*, who would not relieve against it.

On the side of the creditor, Mr. *Dunning*—That though the complaint was nominally and formally against the archbishop, and the rule drawn up accordingly to shew cause why he should not pay the costs, yet there were other parties, who understood that it was virtually and substantially against them, and who defended accordingly.

That the reason why no authority is supposed to have been given by the archbishop is, that upon the defendant's being introduced to his Lordship's secretary, to enquire whether the proceedings were by the authority of his Lordship, he was informed by the secretary that there was no such authority given: And that, by the advice of Dr. *Ducarell*, who had informed him no such authority could be given at the instance of a creditor, he had refused the application.

And that they received a second answer, of the like nature, from the archbishop himself.

There could be no day afterwards, in which it could be conceived the archbishop was otherwise informed, or had changed his mind.

Whether the authority was really applied for personally will not be necessary to decide the merits; both they and the archbishop, by their conduct, evidently took the application to him personally would not be improper.

Farther, it does not appear whether the bond was not applied for, and consequently obtained, after the action commenced; if so, subsequent to the action, it can never maintain it.

Besides, if there be no oppression from the archbishop, the court will not listen to such a complaint in this kind of proceeding, where the other party has been oppressive.

The next question is, whether the bond be warrantable?

It will depend on the nature, the conditions, and the object of the bond, whether it were competent to make use of such a kind of bond at the instance of a creditor.

What is the bond? If *A. B.* administrator, do make a good inventory, true account, and distribution, according to the act "for the better settling of intestates estates.*" For this the administratrix in this case, the widow of the intestate, is made liable, and her sureties,

Perfect

* *Viz.* 22 & 23 Car. 2. c. 10. the provision of which is thus: "That
 " all ordinaries, as well the judges of the prerogative courts of Canterbury
 " and York, for the time being, as all other ordinaries and ecclesiastical
 " judges, and every of them, having power to commit administration of
 " the goods of persons dying intestate, shall and may, upon their respective
 " granting and committing of administration of the goods of persons dying
 " intestate, after the first day of June one thousand six hundred and seventy-
 " one, of the respective person or persons to whom any administration is
 " to be committed, take sufficient bonds, with two or more able sureties,
 " respect being had to the value of the estate, in the name of the ordinary,
 " with the condition, in form and manner following, *mutatis mutandis*, viz.
 " The condition of this obligation is such, that if the within bounden
 " *A. B.* administrator of all and singular the goods, chattels, and credits
 " of *C. D.* deceased, do make or cause to be made a true and perfect in-
 " ventory of all and singular the goods, chattels, and credits of the said
 " deceased, which have or shall come into the hands, possession, or know-
 " ledge of him the said *A. B.* or into the hands and possession of any
 " other person or persons for him, and the same so made do exhibit or
 " cause to be exhibited into the registry of _____ court, at or
 " before the _____ day of _____ next ensuing; and the same
 " goods, chattels, and credits, and all other the goods, chattels and credits
 " of

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Perfect account and distribution is required—to those who are by law entitled; that is, the next of kin: The creditors have no concern in it.

Your Lordship, in the case of *Greenfield* and *Watts*, argued on the reasons why it was competent for a creditor to make use of an administration bond. Your Lordship argues in a manner unanswerable, or at least I find unanswered. The court did not stay execution fully; but only restrained the use of it to such instances as were thought competent to a creditor. The breach assigned in that case was on the circumstance of not exhibiting an inventory.

The condition in the bond in the case now before the [625] court cannot make the administratrix liable to *devastavit* against her from the next of kin.

As to the assignment of a breach here for not making an inventory, it could not be assigned, consistently with the truth and justice of the case. The real injury has been assigned, that the administratrix did not make a true and perfect inventory, which the statute requires.

As to the merits, the circumstances of this case preclude the application of the other case.

I submit, therefore, the ground remains entire on both parts of the rule; though I am much less solicitous upon the first than the second point.

On the other side, in reply, in behalf of the defendant, *Hanse*—That this application is well founded, and the rule ought to be made absolute.

“ of the said deceased at the time of his death, which at any time after
“ shall come to the hands or possession of the said *A. B.* or into the hands
“ and possession of any other person or persons for him, do well and truly
“ administer according to law; and farther do make or cause to be made a
“ true and just account of his said administration at or before
“ day of . . . And all the rest and residue of the said
“ goods, chattels, and credits which shall be found remaining upon the
“ said administrator's account, the same being first examined and allowed
“ of by the judge or judges for the time being of the said court, shall de-
“ liver and pay unto such person or persons respectively as the said judge
“ or judges, by his or their decree or sentence, pursuant to the true intent
“ and meaning of this act, shall limit and appoint. And if it shall here-
“ after appear, that any last will and testament was made by the said de-
“ ceased, and the executor or executors therein named do exhibit the same
“ into the said court, making request to have it allowed and approved ac-
“ cordingly, if the said *A. B.* within bouden, being thereunto required,
“ do render and deliver the said letters of administration (approbation of
“ the said testament being first had and made) in the said court, then this
“ obligation to be void and of none effect, or else to remain in full force
“ and virtue.”

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The archbishop did not understand himself as personally knowing and refusing, but officially, without his private knowledge, giving them authority: The proceedings go upon a direct contrary ground.

The question then is, whether the party to this rule, Mr. *House*, ought, upon the circumstances, to proceed upon this bond.

And whether he has not made an improper use of the bond?

An inventory was litigated, and therefore more exactly taken in this case, and there could be no breach assigned upon that.

As to the formal breach of the condition, your Lordship will never suffer him to avail himself of that who was not, originally (being a creditor) intended to take the benefit.

The order to an ecclesiastical judge, in matters subject to his jurisdiction, does not apply to a creditor, who, if he take any advantage, it must be a casual advantage, by being able to charge the administratrix from the inventory so far, with assets in her hands.

The non-payment of a debt cannot be a breach of this bond.

The condition to abide by the sentence of an ecclesiastical judge (which is the third object of the administration bond, provided by the act) must be for the benefit of the next of kin.

626] But farther, then, if the creditor may avail himself of any of these conditions, the claim being rather foreign to the original design, it ought to be on a very equitable ground; and no such ground has been yet assigned.

Lord *Mansfield*—No next of kin ever struggled for the administration of insolvent assets, with an honest view.

The administratrix in this case shews manifestly what she wanted by administration: She wanted to sell it to the creditor.

She gets administration—Upon this all the chicanery and false pleas that could be made use of are applied, to defeat the creditor: And, to complete all, and shew these observations are not ill founded, she absconds.

A creditor (or creditors) takes out administration.

I choose to take as the first ground what is said, "That no creditor can have the benefit of this bond; it ought not to be assigned to him."

Next

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Next comes that the archbishop of Canterbury (in his private person) has not assigned to him.

To be sure, the archbishop of Canterbury and his ordinary are in the nature of official not of private persons. But, waiving that for the present, what is it that the archbishop is to do? Ought he to have assigned, in this instance, to the creditor?

What is it that the act requires of him? He is to take a bond of the proper parties that they shall account, make a full and perfect inventory; and distribution is to be made to the next of kin.

In doing of this or any part of it the ordinary has no interest of his own; it is *ex debito justitiæ* to grant the bond, on proper circumstances, and to the proper parties. If it should be abused, it would be a good reason to set aside the bond, as an abuse of public trust.

It is said this point has been litigated in 1745, but it does not appear upon what authority.

Two cases were cited from that argument; which, it appears, were held then not to the point.

Let us see what are the points, as to which a creditor is interested in the administration.

+ It is plain the creditor has no interest in the distribution after debts paid; but he has an interest in a good and perfect inventory being given in, and a true inventory.

And he is interested in the distribution before payment of his debt, to see that it is not so made as to exhaust the fund out of which his debt is to be answered.

The name of the archbishop is his official name, not the name of the person.* To one who has a right it is *ex debito justitiæ* to grant it; to one who has no right it is *ex debito justitiæ* to refuse.

As to what was requisite on this occasion, I don't wonder the archbishop might not recollect it. He might refer to Dr. Ducarell: If Dr. Ducarell gave the answer which is stated he was ill advised.

If it rested upon the answer of the archbishop it might be a different consideration, as to costs: But I am astonished at what has passed.

Aylett, the attorney, applies to Crispin, and asks him by what authority he proceeds—who says he has no right to expect candour; in which, I think, he did wrong.

He

Interest of creditor in administration bond.

[+627]

Archbishop name of office and not of person: Acting officially, he has no private or personal discretion, and his acts by his proper officers bind him, though without his personal knowledge, or even against his private will.

* Aliud est dignitatis & officii publici nomen; aliud personæ & rei private.

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He then receives all the intelligence from *Vernon*—of a bill filed; of the advice by him to the archbishop; of the reference to Dr. *G. Hayes*; and that the bond had been permitted to be sued by the creditor upon that reference; and that he had authority to mention all this, as being informed by him.

What was he then to do if he doubted the truth, which was almost impossible? A man could hardly have had the impudence to invent all this; and it is sworn he went to Mr. *Vernon*; if he did not, he ought.

This was on the fourth of June. On the eighth of June, in the morning, he applies for the rule, after all this information received.

And therefore, I think, the rule ought to be discharged with costs.

I was only in doubt whether it should be against the representative or *Aylett*.

[628] RULE DISCHARGED WITH COSTS against *Aylett*; to be paid by *Aylett*.

Statutes and Cases concerning Administrators.

Statutes, the foundation of their authority, 31 E. 3. c. 11. anno 1357.

21 H. 8. c. 5.

22 & 23 Car. 2. c. 3.

9 & 10 W. 3. c. 41. Fees of administration to seamen's effects.

Cases. *Turner and Davies*, T. 22 Car. 2. B. R. 1 Mod. 62.

Administrator cannot have execution after his administration revoked.

Action for rent incurred in administrator's own time, *plene administravit*, is a bad plea. 26 Car. 2. C. B. T. 1 Mod. 185, 186.

Administrator must make distribution to the half as well as the whole blood. Hil. 27. 8 Car. 2. C. B. 1 Mod. 209. *Smith's case*.

Administration pleaded, granted by the official of A. bishop of Carlisle, good without alledging him to be ordinary. 2 Mod. 65. *Daws v. Harrison*. Hil. 27 & 8 Car. 2. C. B. *Temple v. Temple*. Cro. Eliz. 711.

Hodge v. Clare. Administration granted *durante absentia* of another good, as well as *durante minori etate*. 4 Mod. H. 2 W. & M. But vide *Slater v. May*. 2 Lord Raym.

1071.

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1571. That such administrator must aver absence specially, to wit, in *partibus transmarinis*.

To be granted where there are executors if they refuse to act, which they may do by act as well as by words. *Broker v. Charter*. H. 30 Eliz. Cro. 92.

Administrator of an executor no administrator of the first testator. *Parsons, alias Frowde, v. Parsons, alias Frowde*. H. 31 Eliz. B. R. Cro. 211.

By custom administrator may pay debt on simple contract, [629] *pari gradu*, with debt on specialty. *Snelling v. Norton*. T. 37 Eliz. C. B. Cro. 409.

Where *profert litteras administrationis* needs not be pleaded *quia* on record. *Earl of Shrewsbury v. Sir Walter Lewson*. M. 39 & 40 Eliz. C. B. Cro. 592.

Where it must. *Sir John Cutts v. Bennet*. M. 14 Jac. Cro. 409 & 412.

Administration during minority of executor ceaseth at seventeen. *Pigot v. Gascoyn*. Hil. 40 Eliz. Cro. 603.

Administrator during minority of executor hath but a special property, and cannot sell goods, unless they be *bona peritura*, or for necessity for payment of debts. *Price v. Simpson*. M. 41 & 42 Eliz. C. B. Cro. 719.

Administration granted to a stranger is repealed by administration granted to next of kin; but the mesne acts are good. *Blackborough v. Davies*. T. 13 W. 3. 1 Lord Raymond, 685.

Administrator *de son tort* liable to lawful administrator on action of money had and received, waiving the tort. M. 4 Anne. Lord Raymond, 1217.

Mandamus to commit administration. T. 9 G. 3. Br. Sir. 552.

Lies not for administrator *durante minore etate*. Hil. 4 G. 2. *Smith's case*. Str. 892.

Administration shall relate for some purposes to the death of the testator; but this fictitious relation shall divest a mesne right in a stranger. *Waring v. Dewberry*. T. 4 G. 2. Str. 97.

Baron shall have administration though the feme have a power to make a will. *Rex v. Bettsworth*. Hil. 4 G. 2. Str. 891. But this seems to be understood where the power is partial, that *pro tanto*, as is not within the power, the husband shall have administration; where he has given her power under which she may dispose her whole interest, and she does it, it is otherwise. Vide 2 Str. T. 12 G. 2. p. 1111 & 1118.

Against

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Against administrator *durante minore etate*, the spiritual court may take bond for duly administering, *Folkes v. Decinique*. 2 Str. T. 31 G. 2. 1137.

[630] Administrator, *pendente lite* about a will, may bring actions. M. 5 G. 2. p. 917.

Administration, *pendente lite* may be pleaded *pius darraine* continuance to justify a retainer. *Vaughan v. Browne*. 2 Str. 1106. Hil. 12 G. 2.

Administrator liable for rent after assignment of testator's term. *Coghill v. Freelove*. M. 2 W. & M. 2 Ventris, 209.

For a large comment on the statute of E. 3. and the nature of administration, vide R. Edgewcombe, knight of the bath, against Rowland Dee, administrator. *Vaughan's Rep.*

Vide also *Dyer*, 256.

And *Plowden*, 275. *Greysbrook v. Foxe*. And what acts of administrator *de tort* shall bind the executor.

Other cases relative to administrators.

Lady Grandison v. countess of Dover. 34 Car. 2. 3 Mod. 2. 3. S. C. *Skinner*, 155.

Palmer v. Allicock. 3 Mod. 58.

Newton v. Richards. T. 6 W. & M. 4 Mod. 296.

Adams v. terretenants of Savage. Pasch. 3 An. 6 Mod. 134.

Dorrell v. Collins. T. 24 Eliz. C. B. Cro. 6.

Martin v. Whipper. M. 30. 1 Eliz. B. R. Cro. 114.

Stubbs v. Rightwife. T. 30 Eliz. Cro. 102.

Atkey v. Heard. Cro. Car. 219.

Skinner, 143.

Petit v. Smith. 1 P. W. 8.

Hook's case. T. 2 W. & M. B. R. *Carthew*, 153.

[631] Rule on the Sheriff.

WHEN the sheriff is ruled to bring in the body he has four days, exclusive of the day when the rule issued, and was served upon the sheriff.

Vallerjo

Vallezjo and Echalai *against* Wheeler.

BARRATRY.

On a Policy of Insurance.

MOTION for a new trial, on a verdict having been found for the plaintiffs, upon the following facts.

In November 1772 *Darwin* chartered the ship *Thomas and Matthew* of one *Brown*, and agreed by his said charter to freight her for Seville, and back again.

The plaintiffs and many others shipped a cargo on board, and insured the same.

The insurance provides against losses by storms at sea, &c. and against barratry.

In the policy it is declared that the same shall not be void by reason of any flaw in the vessel unknown to the assured.

The ship sailed in December 1772, and went to Guernsey, took in a quantity of brandy, which the captain meant to run by way of clandestine trade; the night following they sprang a-leak, which drove them into Dartmouth; from whence they went to ————— in Cornwall, where the brandy was seized, by authority of the custom-house.

By the bad weather, &c. the ship was rendered unfit for the voyage, which had been partly prosecuted, after putting into Cornwall.

The parties came to an agreement that the insurance should continue, and protect the goods on their return to London.

The goods were spoilt, whereupon this action was brought.

The declaration consisted of three counts.

First, That the ship set sail, and in sailing sprung a-leak, [632] by the storms and perils of the sea; whereby the master was obliged to repair to Dartmouth, to refit the ship, and then put forth again: And in proceeding and going to the place of destination, by storms, and accidents of the sea, the bowsprit was split, &c. and the ship in divers other parts and places damaged, and rendered wholly unfit to pursue her voyage; by which storms, &c. and by which accidents, &c. the goods were spoilt.

Second count, That the ship sprung a-leak in her voyage from Dartmouth, &c. whereby the goods were spoilt.

Third

Third count, That by the fraud and barratry of the master the goods were destroyed, and rendered useless, and of no value.

The underwriters contended, that this damage was occasioned by a simple deviation of the captain; not fraudulent, as against the owners of the goods; and was neither merely accidental, nor barratry, being no fraud against the owners.

The insured insisted that either it was an accidental loss, and then they were entitled to recover, under the general terms of the insurance against loss at sea, by storms, &c. or else it was barratry.

The jury, at the trial, had found (under the direction of Mr. Justice *Asbhurst*) that the voyage of the captain to Guernsey, where he took in the brandy, was with the privity of *Willes*, who was the owner of the hulk of the vessel, but without the privity of *Darwin*, who was, under the charter-party, the owner.

And they found a verdict for the plaintiffs.

And now, upon a motion for a new trial, cause was shewn against the rule by Mr. *Alleyne*.

This case was argued more than once, namely, in this term and in Michaelmas term; but I have endeavoured to throw the substance of both arguments together.

[633]

He began his argument by observing that Barratry was a word hitherto not precisely defined in our law, or at least not familiarized by experience: But that it was apparent, from the case in *Strange*, that it was far from true that barratry was confined to some act of fraud, or injury done *malis animo* immediately against the owners; for that any fraudulent act, whereby directly or consequentially, the owners received damage, would be barratry within the terms of the insurance, though there might be no special malice against them.

In *Knight v. Cambridge*, *E. 10 G. B. R. Str. 581*. Insurance against barratry, breach assigned; a loss *per fraudem et negligentiam* of the master. Judgment for plaintiff in *C. B.* and general errors assigned.

Objected in argument on error, that fraud and negligence is a general charge, and not sufficiently precise to be within the terms of the insurance providing against barratry.

Per curiam—The negligence certainly is not, but the fraud is barratry; is of a general signification, and not confined barely to running away with the ship. It comes from *barat*, which signifies *fraus et dolus*, and extends to any fraud of the master. The end of insuring is to be safe in all events, and it would be very pernicious if we were making loop-holes to get out of these policies.

This

This case, then, is an authority in point; and upon solemn consideration that fraud is barratry. The case of *Stamma v. Brown*, 2 Str. 1153, applies the principle yet more particularly and directly to the case now before the court.

That case was thus: The ship the Gothic Lion being advertised going to Marseilles, goods were shipped on board her on behalf of the plaintiff, and a bill of lading signed by the master, whereby he undertakes to go *a droite route a Marseilles*, and the defendant underwrote a policy from Falmouth (where the goods were taken in) to Marseilles: Before the ship departed from the port of London another advertisement was published for goods to Genoa, Leghorn, and Naples, and the plaintiff's agent was told it was intended to go to those ports first, and come back to Marseilles; but he (the plaintiff) insisted that his bargain was to go first or directly to Marseilles, and that he would not consent to let her pass by Marseilles, or alter his insurance.

The ship, notwithstanding, did pass by Marseilles, and, after delivering her cargo at the other ports, set out on her return with the plaintiff's goods; but, in her voyage thither, was blown up, in an engagement with a Spanish ship. And, in an action upon the policy, the breach was assigned for a loss by the barratry of the master. And the plaintiff insisted, that any fraud or malversation was barratry; and *Dufresne* is there quoted. And the reporter sets down (as referred to) *Florid's* Italian dictionary, title *Barrataria* *Minshew & Furetier*. And by the &c. which he adds, it appears, that other books were quoted. As to some, which I think pertinent to this cause, I mean to desire the favour of the court presently; and to submit them to their judgment.

The defendants counsel insisted this was only a deviation; for that it could not be a crime in the master, who was acting all the while for the benefit of the owners.

The chief justice, who was Sir *William Lee*, in his direction to the jury told them that this being against the express agreement to go first to Marseilles, seemed to be more than a common deviation; being a formed design to deceive the contractor: Then he subjoins what immediately and most forcibly applies to this case, and compares it to the case of a ship sailing out of port without paying duties, whereby the ship was subject to forfeiture, and which, it is added, has been held to be barratry.

[634]

The

The jury staying out some time and asking the chief justice whether it would be barratry, if the master was to have no benefit for himself by passing by Marseilles, and went only to the other places first for the benefit of the owners, the chief justice answered, no : And they found for the defendant.

On a motion for a new trial the verdict was confirmed.

It is needless to insist on the agreement between the cases. That would have been barratry if done for the private benefit, of the master ; this is done for his private benefit, and for the benefit of no other of the parties concerned : The plaintiff was there informed of the intention ; here it was kept from him and is of itself a secret, clandestine fraudulent action : There the deviation was for the benefit of the owners ; here it is to the prejudice of *Darwin* who is owner for the voyage.

Though I should think the case sufficiently established from these authorities, and its own reason and clearness, yet, as mercantile law is a part of the law of nations, your Lordships will receive the evidence of that law, and be guided by it in your decisions : And since this word barratry does not seem hitherto generally understood, it may not be improper to examine what the language and usage of other commercial nations says, in confirmation of those authorities of our own already cited.

And first I will begin with foreign books ; next I mean, to submit to the consideration of the court foreign ordinances.

Denifart, in his collection of new decisions upon this word, * says “ this word signifies malversation or deceit by a captain or master of a merchant vessel, in what concerns the quality or quantity of the merchandizes.”

[635] The definition is general—malversation or deceit, though the instance is particular, as being one of the most common and obvious ; and he refers for the sense he gives to a decree of the 6th of Sept. 1689, in the journal of audiences.

The next author I shall take leave, under the indulgence of the court, to cite is *Ferriere*, † who in his dictionary says
“ barratry,

* Ce mot signifie *malversation* et tromperie par un capitain ou patron de navire marchand, dans ce que a rapport à la qualité et à la quantité des merchandizes ; voyez sur ce la un arrêt du 6 Sept. 1689. au journal des audiences. *Denifart*, collection des décisions nouvelles sur ce mot.

† Barratrie en terme du marine est une tromperie ou une malversation qui se commet par patron ou le capitaine d'un vaisseau pour faire perdre les merchandizes à ceux à qui elles appartiennent.

Par exemple, de charger un barque pendant le cours de la navigation et une crime de barratrie qui est punissable. Voyez l'Arrêt.

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“ barratry, in marine language, is a deceit of malversation
“ committed by a captain or master of a vessel to cause, or
“ causing those to lose their merchandize to whom it be-
“ longs.”

For example, to load a vessel during the course of the voyage is the crime of barratry, and is punishable. See “ the decree.”

He puts this then as an example and one instance of many; and if this be a crime (the crime of barratry) and punishable, how much more to go out of the way to load a vessel with prohibited goods, which is a double offence; an offence against public law and private contract, and subjects the owner of the goods to a double risque.

The author whom I shall beg leave to cite next is *Savary*, ‡ who says “ barratry of the master, in the language of com-
“ merce and merchandize, means the larcinies, disguising
“ and alteration of merchandizes which master or crew
“ may occasion; and generally all kinds of cheating, tricks
“ and malversations, which they often employ to deceive
“ the merchant, freighter and others who are interested in
“ the vessel.”

Molloy considers barratry as affecting the goods on board only by thefts; but this is evidently a short description, and not to the extent of the crime; as appears from the other authorities cited, and those which remain to be cited.

Mortimer says, “ it is running away with the ship, sinking her, deserting her; or embezzling the cargo.

Of these several definitions some are less exact, others more; some more general, others defective: But they all shew barratry to be a crime, and some of the most considerable seem to prove that it is a crime of any sort of deceit or malpractice, injurious to the owners of goods in the vessel.

I next would desire the permission of the court to proceed to the still more important and convincing evidence from the ordinances.

And first, the celebrated ordinance of *Lewis* the fourteenth, page 254. art. 28. defines it thus—

“ The

‡ Barratrie de patron en terme de commerce et merchandize veut dire les larcins, les deguisemens, et alterations des merchandizes que peuvent causer le maitre et l'equipage d'un vaisseau; et generalement, toutes les supercheries et malversations quil s' mettent souvent en usage, pour tromper le marchand chargeur et autres qui ont interet au vaisseau.

“ The deceit or malversation of the master in the voyage,
“ or in port and harbours; also the disguisings and altera-
“ tions caused by the master or by the crew.”*

The ordinance itself says, the assurers shall not be answer-
able for damages by the default of the master or mariners,
unless they be answerable for the barratry.

If therefore they insure against barratry, they insure
against the fault of the master; and can it be questioned,
whether this conduct of the captain in the case now before
the court be or be not a fault?

And the commentator in his notes describes barratry to
be knavery and deceit.†

Ordinances of Antwerp, No. 4. No barratry to be in-
sured against, (perhaps that greater care might be taken in
the choice of the master.)

Ordinances of Spain, No. 42. Agree with those of France.

Ordinances of Genoa, 1610, refer to a particular code
of laws of criminal statutes.

Ordinances of Rotterdam, No. 43. 1721, distinguish
between neglect and barratry; so that every wilful fraudu-
lent act whereby damage insues, seems to be within the
meaning of these ordinances, as contradistinguished to ne-
glect, whether the injury were intended against those who
suffer by it or not.

Ibid. 52. When a captain, without necessity, and with-
out any orders from the assured, hath altered his voyage,
or run into or touched at any port or road, the insurance to
remain in force.

[637] Ordinances of Hamburg, No. 6. 1731. deserve particu-
larly to be considered.

Ordinances of Stockholm 1750, agree with the ordi-
nances of Rotterdam, No. 52.

Ordinances of Copenhagen, No. 38. distinguish between
barratry and neglect.

Ordinances of Bilbo 1738, No. 19. Mention barratry as
a thing known.

Mr. *Alleyne* cited two other common law cases.

Vide Hales *Elton and Brogden*, 2 Str. 1264, where the ship being
Pl. of the run away with, but not with an intent to defraud the
Crown,
title Homicide, where a man intending one unlawful act, is chargeable for another con-
sequentially: and Bacon's law tract.

owners,

* Tromperie et malversation du maître dans les routes, portes, et havres;
ensemble les larcins, les disguisemens, et alterations causés par le maître ou
par l'équipage.

† Roccus ad notas, barratria, ribaldoria et fraudes

owners, it was held not barratry: But then it was by the violence of the crew who forced him back, notwithstanding he told them the orders: Which therefore as is observed there, fell within the excuse of necessity, which has always been allowed. But this proves still farther, that barratry is a crime, and if it be a crime, he who commits it, must answer for the consequences; though a different mischief was produced, and to different parties from what he intended;* especially when the probability of mischief to the owners of the goods, from this fraudulent departure, and taking of prohibited goods on board with theirs, was so obvious in a double view.

Lewin and Swaffo, Partr. 147. by Lord Hardwicke. Barratry is an act of wrong done to the ship. Now, I think, it cannot be doubted, that this unlawful act of the captain, without the privity and against the interests of the freightor and against his contract, was an act of wrong, and a wrong to the goods so endangered by it and afterwards lost: And he cannot be at liberty to say that otherwise they would have been lost. And it is no excuse to him even if he could, when he has wilfully and fraudulently taken the risque of losing them thus, and exposed them by his unlawful act, and in breach of the faith of his agreement, to destruction.

Upon the whole, both from our own cases and from the concurrent testimony of writers and public acts of other countries, I hope, I am warranted in submitting to your Lordship these two observations:

First, That any offence against the laws of a country whereby the vessel or cargo may be subjected to a condemnation, is barratry.

Secondly, Any injury done to the vessel or cargo, with a [638] direct intention to defraud the owners.

I think it is beyond controversy, that the captain of the vessel in this case falls under the first of these descriptions; and that therefore the insurers are liable under the clause in the policy which insures against barratry, and that the verdict was well given for the plaintiffs, and of course that the court will discharge this motion for a new trial.

On the part of the motion it was urged by Mr. Buller.

I submit, that nothing done by the captain in this case could be barratry, unless the deviation was without the knowledge of the owner; for he is not charged with running away with the goods or ship, burning or destroying them,

* In criminalibus sufficit generalis malitia cum facto paris gradus.

them, or any direct injury to the goods, or any malice to the owners of them.

And upon the deviation, if the plaintiff chooses he may resort to an action, and recover against those from whom he may be entitled to recover; but not for barratry.

The court in the case in *Strange* says, to make it barratry, there must be something of criminal conduct and not merely a breach of contract.

Where the master was by force obliged to desist from his voyage, the plaintiff's counsel would have made barratry of it, but the court would not suffer it as it was no act of intention to defraud the owners; here whoever is considered as the owner, there is no act done by the captain with an intention to defraud him: And as to the attempt of considering this as criminal, because of the unlawful purpose of the deviation, it being to take in prohibited goods, it is nothing to the owners; I don't understand that it was proved; but if it were it is not criminal *quoad* the owners of the goods.

In *Posslethwaite's* Dictionary of trade and commerce, which I understand to be generally esteemed one of the best books upon the subject, by gentlemen conversant in mercantile transactions, barratry is defined to be cheating the owners or insurers, whether by running away with the ship, sinking it, deserting her, or embezzling the goods; all clear, direct, positive acts of express malice and prejudice to the owners; this is a conjectural consequential damage with no malice to the owners under any pretence.

[639] But farther with regard to the ownership, I shall beg leave to contend that *Willes* was the owner and not *Darwin*, any more than a man who sends parcels by a stage-coach is the owner of the coach, and *Darwin* only freighted the vessel for that voyage. And it is found expressly with the jury that the deviation was with the privity of *Willes*: If so it cannot be barratry; for none can charge barratry but the owner, and he by his privity and assent waives the charge.

The dispute in the case of *Knight* and *Cambridge*, was whether it was necessary to use the technical word barratry, for the fact was a total loss of the ship laid to have happened by the fraud and negligence of the master: And there can be no dispute that such an act of direct injury to the person interested in the vessel would be barratry; but there is nothing like it in this case.

And upon the question put in the case of *Strange*, whether it would be barratry if the master went out of the road by

by the desire and for the benefit of the owners? The chief justice answers no; and the jury find their verdict accordingly. Here the jury have found that the deviation was with the privity of *Willes* the owner; and if it were necessary, which after this it is not, it might be no difficulty to prove that it was for his benefit.

As to negligence being barratry, the case in *Strange* is otherwise, at least it must be *crassa negligentia* such as infers malice, and of this, enough has been said already. As to going out without payment of port duties, that is an act which from the beginning openly abandons the goods and shews an original design of fraud; not so a subsequent accidental deviation though it may be for an illicit purpose.

I must object as to the ordinances of Stockholm; they are matter of positive municipal law of a foreign country, and ought not to bind the decisions of this court.

Lord *Mansfield*—It is very proper by way of exposition of the general law and custom of merchants. *Colbert's* edict 81. has been quoted an hundred times: And this ordinance goes as part of the general maritime law, which is a branch of the law of nations.

Mr. *Buller* continued—Barratry must be, as the several writers have defined it, a positive direct fraud to the owners, either by destroying or abandoning the ships or embezzling the goods; this is none of these, and therefore not barratry, and with this agree the ordinances of Middleburgh, Amsterdam, Schoninberg, Hamburg, Florence, and Rouen. Another point Mr. *Buller* endeavoured to support, that they have laid it as barratry or a loss by fraud of the master; and in another count accidental loss by storms of the sea: And that this was repugnant, and therefore they should recover on neither.

Lord *Mansfield*—It is a case that has rarely happened: I [640] have not that I remember, had a case before me of barratry. I have great doubts of it: It is odd that the insurers (a third person) should insure the owners against the act of their own officer whom they themselves appoint.

A good deal depends upon the nature of the agreement by the charter party; whether it is an agreement between the owners and freighters that the ship shall go to a particular place, or whether it is a letting of the ship to the freighters.

As to barratry it is agreed by all the books that it must arise *ex delicto*; but they do not agree as to the nature of the offence: It is settled that every deviation is not barratry.

It seems that barratry should be a loss of the ship or goods by any crime, negligence or deviation of the master directly injurious to the owner, and *malæ animo* as against him, whether it extends farther to consequential damages, and such as are not even clearly and directly consequential, but as it were collaterally emerging, and casually and remotely incidental, uncertain whether they would or would not have happened otherwise, whether this be barratry may be matter of farther consideration.

It is agreed, that if a ship goes out without paying port duties and is seized, this is barratry.

I should pay great respect to the gentlemen of the special jury who were considerable merchants, the proper judges of a cause of this nature.

If the ship had been seized at Guernsey, this would certainly have been barratry.

I don't see it is shewn who is the owner. As to the assignment of the third count, I think you might have recovered if it had not been barratry, [upon the other counts without.]

Let it stand over.

CURIA ADVISARE VULT.

Afterwards on the last day of the term Lord Mansfield threw out some hints, on points material in the cause, to this effect.

We have thought of this case: I have never met with it in my time.

The definition of barratry seems to be very loose. It is pretty extraordinary the insurer should insure to the owner for the behaviour of a man put in by himself.

[641] Thus much however, I think, appears of barratry; it seems to be held that it must be a crime.

It is to be considered whether the loss must not happen at the time of the barratry.

There was great stress laid on *Willes's* knowing it; and to be sure, if *Willes* be the owner, with great reason; for if the owner insures, he cannot recover against his own order or consent.

But it is material, when a ship is let to freight, whether the owners of the goods have not the direction; if it be let as an house to the freighter, then he, the freighter is owner.

If on the other hand it is only a covenant between them that the ship shall go that voyage for the freighter, then it is

is only like an hackney-coach or stage-waggon; and the freighter has only the use for his goods; not the direction.

There appears nothing clear from the opinion of *Stamma* and *Brown* but this—that not every breach of contract is barratry.

Not every deviation is barratry: If there is fraud it is said it will be barratry, and it must be it is said *ex delicto* and so much appears clear.

But is every offence, is every loss some way or other resulting *ex delicto*, whether direct or remotely consequential, whether necessarily or probably, or possibly occasioned by the offence, or uncertain whether occasioned by it or not, barratry? I think, one ground must be *ex delicto*, but whether such offence as would subject a man to a criminal prosecution, as running away with the ship, destroying the goods or the like, may be a question.

And so it may what kind of loss, and how far a loss not direct but consequential, and what shall be held a consequential loss to this purpose.

Where a deviation was made there is an authority, that going quite out of course and delaying is not barratry.

That case of *Stamma* and *Brown* was very accurately, it seems almost *verbatim*, taken by my brother *Willes*.

To order a new trial till we have settled our opinions with regard to the law would be quite nugatory.

Of the ordinances, that which speaks most sensibly is the ordinance of Florence, I believe, which says no such insurance shall be made. [642]

A crime with respect to the owner of the goods, it is clearly held it needs not be. For if the ship go out of the port without payment of duties and is taken, this is barratry. The only question seems to be whether the damages must be direct or consequential.

CURIA ULTERIUS ADVISARE VULT.

Afterwards, on Thursday Nov. the 20th, in Michaelmas term, Lord *Mansfield* delivered the judgment of the court to the following effect:

This case has been for some time for the consideration of the court. We are agreed in our opinions. I will first state the case. You will attend, because I have not got the report, but only a short note, for fear I should omit any material circumstances.

This is an action on a policy of insurance upon a voyage from London to Seville, which policy undertakes against

barratry; this ship was to take in goods for any persons in the way of general freightage.

The ship belonged to *Willes* as owner of the hulk, but was chartered by *Darwin* for that particular voyage; and without the knowledge of *Darwin* went to Guernsey, and there took in brandy in evasion of the duties. Thence fell into a storm, was much damaged, and driven back to Dartmouth, thence refitted and went on upon the voyage, but in going was so much farther damaged as to be incapable of continuing her course, and obliged to put in at Helford. The ship was not confiscated on account of the contraband goods. In consequence of the damage the ship suffered the goods were spoilt. The plaintiffs brought this action to recover on the policy against the underwriters, for the loss of the goods so happening as is stated, and the terms of the insurance being as is already stated. The jury found a verdict, under the directions of the judge, for the plaintiffs—and they find (as above stated) that the voyage to Guernsey for the purposes already mentioned, was with the knowledge of *Willes*; but without the knowledge of *Darwin*.

Upon this a new trial has been moved, and the general question is, whether this act of the captain in going the smuggling voyage, and taking in the brandy as above stated, be or be not barratry, so as to entitle the plaintiffs to recover.

[643] On the trial the defendants contended this was not a deviation, because it was a new voyage: So far they were right; but it was contended by the plaintiffs that it was barratry; because a voyage against orders for an illegal purpose, whereby the goods were exposed to danger, and were afterwards actually spoilt.

Much stress was laid upon the trial, that if with the consent of *Willes* it could not be barratry; because barratry could not be when with the consent of the owner.

To be sure when the owner orders or consents to any thing, he cannot recover against his own order or consent given for what has been done.

And this, as it is true in the principle, would have been very true in the application, if *Willes* had been at all concerned in the case.

I believe it has never been decided with accuracy what barratry is, in England; and as in all mercantile transactions I have held certainty of greater consequence than perhaps upon what rule originally the case was decided. I think general verdicts are not to be regarded, as certainty is never

to be had from them, it not appearing on what grounds the jury found. And in general notes of cases taken at *nisi prius*, though ever so well taken, and decided by judges of ever so high authority, are liable to the same objection for similar reasons.

In *Pole* and *Fitzgerald*, it may be seen how much the different reasons given as the ground of the judgment, in cases of general verdict, tend to exclude certainty from cases of that nature.

Of the common law cases which merit consideration upon this head, there are however *Knight* and *Cambridge*, where it was held that one act of barratry, was going out without payment of port duties. And the court says that barratry is of a general signification, and not confined to running away with the ship; that it signifies *fraus* and *dolus*, and extends to any fraud of the master; that the end of insuring is to be safe in all events.

Stamma and *Brown*, the case from the question there put, and the answer by the chief justice appears very much to the present case.—The vessel was to go straight to *Marseilles*, and it goes out of the way seemingly on a formed design, somewhere, to cheat the contractor in the voyage. He says this is not simply a deviation but somewhat more. The jury ask whether if it were for the advantage of the owner, and not his own, this was barratry. The chief justice tells them no; they find for the defendant; And upon a motion for a new trial it is refused, because it appeared the master acted consistent with his duty to the owners, and the plaintiff's agent knew of the intended alteration; and to make it barratry there must be something criminal. [644]

I don't think either of these cases strong enough to fix the bounds of what is, or is not barratry.

The last case is *Elton* and *Brogden*. There the ship went out with letters of marque insured by the defendant. In her voyage she took a prize and returned to Bristol, and received her proportionable part of the premium. Then another policy was made; she sailed again with express orders from the owners, that, in case of taking another prize, they should put some hands on board the said prize, and send her to Bristol; but the ship in question should continue her voyage with the merchant goods. Another prize was taken, and the captain gave orders to some of the crew to carry the prize to Bristol, and designed to go to Newfoundland; but the crew opposed and insisted he should go back, though he alledged his orders; and they forced him

him out of the way whereby his own ship was taken, but the prize got safe.

On action brought against the insurers, it was contended this was such a deviation as discharged them; but the objection made to this is, that here was a force upon the master such as he could not resist: but the answer is, the insurance is against the crew as well as the master. I think the more probable ground is, that, as this was a vessel upon a privateering voyage, it was necessary they should take care of the prize when they had taken it, and the crew exercised their judgment for the benefit of the ship.

I come now to the case before the court; which being material, and as it appeared to me a new one, I left it for argument; and it has been very ably argued.

As it was a matter of a commercial nature, and turned greatly upon the usage and custom of merchants, I consulted an eminent merchant of whose skill and experience I have great opinion.*

I do not find the meaning of the word has been settled in this country. The books and ordinances of other nations were very properly quoted to come at the understanding of their use of the word.

[645] The Italians were the first great trading nation who introduced the word. *Barrattare* in the Italian dictionaries signifies to cheat, defraud, or trick; and this seems to have been the general acceptation of the word in other trading nations, who have borrowed the term from thence.

Yet undoubtedly, where the case is of the owner of the ship consenting, he cannot recover for what was done by his knowledge and consent. But in this case *Wiles*, the general owner, has nothing to do with it: *Darwin* engages; puts the goods on board; it was against the consent of the owner, for this purpose, if what was done was against the consent of *Darwin*.

What is done? The ship is to set out from London to Seville; *Darwin* relies upon this; and trusts that the voyage will be immediate, as on the faith of the insurance he had reason. The master, instead of going directly to Seville, goes upon an iniquitous voyage by which the ship was liable to be confiscated: This is the deceit upon *Darwin*; and the goods, after this fraudulent departure from the course of the voyage, the ship falling into a storm, are spoiled.

And

* Quilibet in arte sua est credendum.

Trinity Term, 14 Geo. 3. K. B.

And whether the damages happened directly or not, does not signify; nor whether it was an act of immediate intentional injury against the owner of the goods.

If the master runs away with the ship this is barratry, and though the ship afterwards returns and pursues the voyage it is still barratry, and the person who by so offending was once liable, continues liable as to all consequential damages.

Here I think the damage sufficiently appears, and upon the general principle falls within the rule of consequential damage, as it might not have happened but for the illicit voyage; and whether it would have happened or not, if the ship had continued in its straight course, is not material.

And in this case there is great reason. *Darwin* has insured: he loses by the deviation; the deviation is the voluntary, illegal, fraudulent act of the captain; and therefore it appears to me extremely clear, that this smuggling voyage was barratry in the master, and consequently comes within the terms of the insurance; and of course that the verdict is right, and that there ought not to be a new trial.

Mr. Justice *Aston*—One would wonder, when this word was in use two hundred years ago, that there should remain now any doubt what barratry is.

I think it has always been the same in idea and general meaning, though differing in terms, and not settled in practice—deceit, villainy, knavery, fraud.

In Florence it is so explained near two hundred years ago, [646]

De barratriâ et contrabundâ venditione."

Where the master is acting not for his own advantage, but for the benefit or with the consent of the owners, it appears, by the case in *Strange*, this is not barratry for them to charge him with the loss.

But who in this case is the owner? Verbally, *Willes*, the owner of the hulk of the ship; but really, as far as this question is concerned, he has nothing to do with it; the owner is *Darwin*. I think the jury did very right in considering *Darwin* as owner, *pro hac vice*.*

This

* Thus a man who draws a bill of exchange is a merchant, *pro ista vice*, v. *Green's Bankrupt Laws*, c. 1. and the cases therein cited. 1 *Salk.* 125. *Hodges v. Steward.* *Pasch.* 3d *W. & M.* 2 *Ventr.* 295. 1 *W. & M.* *Sarfield v. Witherley.* And 2 *Ventr.* 310. *Cramlington v. Evans and Purcell*, 1st point in error in *Seacurie*.

This is without the knowledge, then, of the owner : It is not for his benefit, but to the danger of the goods, and for an illicit purpose.

And it would not signify whether the ship was safe or no from that voyage. There is no saying when the mischief happened to the vessel which occasioned the loss.

I think this is one of the cases where the underwriter is liable for the act of the master ; being a criminal act. And the case of *Knight and Cambridge* speaks of any criminal act, deceit, or fraud ; so does *Stamma and Brown*.

Though this may not be within the statute of G. 3. [qu. the statute alluded to] it is at least a deviation for an illegal purpose, which, I think, is sufficient to make it barratry, (being without consent of the temporary owner) and the insurers liable to answer the consequential loss, though not directly or necessarily consequential on the deviation.

Mr. Justice *Willes*—I think this is barratry. *Darwin* was the freightor : I think its being done without the privity of the freightor is the same as if done without the privity of the owner.

The only question that occurred to me was, whether this was a loss by the act of barratry : For the three common law cases seem to say that the loss must happen by the act of barratry.

[647] There is no saying here when she might sustain that loss. By going out of the way she fell into a storm, which she might have escaped if she had not gone to Guernsey, as Mr. *Alleyne* very properly observed. And this, after a verdict, the court may take as probable, that the loss may have happened by consequence of the voyage.

This is certainly a deviation without the consent of the freightor : And possibly the cause of the damage suffered ; and it is a deviation for a bad purpose : And in the justice of the case I am satisfied, whatever I might doubt, since it does not appear to fall within the cases. And though it is not a loss by a fraudulent intent of the master or mariners, to hurt or destroy, or embezzle or corrupt the goods of the owner, yet the substantial justice has been done, and the jury have found a verdict which, I think, we ought not to set aside.

Mr. Justice *Ashurst*—I am of the same opinion as at the trial.

I think they have a right to recover upon either count, whether of loss, storms, and perils of the sea, or for barratry of the master.

As

As to the objection, that the two charges of accident and criminal intent clash with one another, the party shall not set up his own fault as a defence;* for if it was not accident it was a criminal deviation, or barratry; and it is no answer for him to say it cannot be both, and therefore it shall be neither.

I think there was sufficient evidence to find it a loss by storms and perils of the sea, upon the first count, supposing this to have been not barratry.

And farther, I think it was barratry, being a deviation for an unlawful act, and loss ensuing; but even without that, upon the first ground, I think the verdict good on the first count.

[Note, There is a case where this doctrine of consequential damages is very curiously discussed, 3 *Wils.* 403, 13. *Scot v. Shepherd. E.* 13 G. 3. Action of trespass and assault. Plaintiff declares, that the defendant, on the 28th of October 1770, *vi et armis*, made an assault upon the plaintiff, by casting and tossing a lighted squib, whereby he lost his eye.

The case was, the defendant, on the day laid in the declaration, at Milborne Port, in the county of Somerset, at a fair, which was then and there held, threw a large squib from the street into the market-house, where a large concourse of people were assembled; and the said squib thrown by the defendant fell on the standing there of one *W. Yates*, who was then exposing to sale gingerbread, &c. and one *James Wills*, instantly to prevent mischief to himself and to the wares of the said *Yates*, took it up, and threw it across the said market-house, when it fell upon another standing there of one *James Ryal*, who was also exposing the same sort of wares to sale; and the same *James*, instantly to save himself and his goods, took up the said lighted serpent, and threw it to another part of the said market-house, and, in so throwing, struck the plaintiff on the face therewith, and the squib bursting, put out one of the plaintiff's eyes.

The jury found a verdict, with 100l. damages, subject to the opinion of the court: Whereupon, on argument in C. B. the Lord Chief Justice *De Grey*, and *Nares* and *Gould*, Justices, were of opinion that the action well lay against the defendant;

[648]

* *Nemo lucrabitur ex injuria sua propria.*

This maxim was carried to its full extent in the famous case of *Coke*, who was indicted on the *Conventry* act, and pleaded an intent not to maim, but murder; but he was convicted on that act, and executed.

defendant; for that the first throwing was the unlawful violent act of the defendant, and the subsequent throwings were instantaneous, and necessary thereupon, and as it were, *continuan.do* the first; so that the whole was one single unlawful act of the defendant, by force, to the injury of the plaintiff. And the Chief Justice held it to be as if the squib had bounded and rebounded of itself several times after it was thrown by the defendant, before it reached to the plaintiff's eye. *Blackstone*, justice, *e contra*, that action of trespass lay not, but action on the case, for consequential damages; the two subsequent throwings after the first being independent acts, giving new directions to the squib, and not proceeding from the defendant, his order or direction, but from the throwers, as free agents, absolutely *diversis intuitu*, for the preservation of their goods and persons.

I cannot leave this case without acknowledging my obligations to Mr. *Alleyne*, for his very polite and friendly assistance, in furnishing me with his notes of the foreign ordinances to which he referred in his argument; and which notes I have had the pleasure of using in part, as to some other branches of the argument, and in a few places of the judgment, where my own were defective.]

Anonymous.

Attachment for Non-payment of Costs in a criminal Suit.

ON a motion for a rule to shew cause why the defendant should not be discharged out of custody upon the insolvent debtors act.

[649]
V. 21 Ja.
1. c. 8. 13
& 14 Car.
2. c. 6.
f. 16. 22
Car. 2. c.
12. f. 4.
and 5 W.
& M. c. 11.

The defendant had been indicted at the Old Bailey for an assault, and had removed the indictment by *certiorari* into this court; and for non-payment of costs was under an attachment.

The case of *Rex v. Stokes*, 23 G. 2. was cited, who moved to be discharged under the general words of the act of grace, 20 G. 2. and it was objected, that there was an exception of contempts: That was a case also of an attachment on recognizance for non-payment of costs. Lord Chief Justice *Lee* said it was not a contempt where the rights of the subject only are concerned, *i. e.* where the form is of a criminal public suit or process in the name of the crown, but the substance a civil private remedy. Mr. Justice *Wright* quoted a case of an attachment upon a recognizance; and Lord Chief Justice *Lee* said it was not a contempt

tempt till he was put to answer interrogatories; for he might clear himself of the contempt, and the attachment was only *melne* process to bring him into court.

Mr. Justice *Aston* appeared to compassionate the young man's case very much, and said he wished to be able to satisfy himself that it was in the power of the court to discharge him: And he thought it a case which ought to be interpreted in favour of the liberty of the subject.*

Mr. Justice *Willes*.—He has satisfied to the crown by his four months imprisonment: Supposing there was a general pardon he could not be discharged, for the crown has nothing in it, as it concerns the right between subject and subject. † And he cannot, it is said, be discharged under the Lords act, which is a cleft stick indeed.

Afterwards, the next day being the last term, after Lord *Mansfield* had left the court, the three other judges delivered their opinions to the following effect:

Mr. Justice *Aston*.—I apprehend when the decision was made in this court that an attachment was an execution in a civil suit; it was not a new decision, but it was always so.

Now it does not strike me there is any difference in the costs‡ upon the civil suit. The master is to tax, and if not paid within the time an attachment goes. The 9th of G. 3. c. 26. is, in my opinion, a legal recognition that persons shall be discharged from execution on whatever suit.

[650]

This arises upon an act of parliament, whereby when an indictment is removed by *certiorari* the defendant must enter into a recognizance for the costs to be taxed by the master, and if not paid within a time limited (ten days) attachment issues. 5 W. & M. c. 11. §. 3.

If an attachment for costs is an execution, whether the costs are taxed on the side of the master of the crown office or on the civil side, how is he without discharge? And yet if he be not within the benefit of the Lords act, because it is an attachment at the suit of the crown, he plainly on the other hand is not within a general pardon; so it amounts to imprisonment for life.

You can have no more than he has. And I don't see, especially since the statute of the 9th of G. 3. why he should not be discharged.

Mr.

* *Leges Angliæ omnium libertati favent.*

† *Rex non potest gratiam facere cum injuria alterius.*

‡ *Accessorium sequitur principale.*

Trinity Term, 14 Geo. 3. K. B.

Mr. Justice *Willes*—Statutes in favour of the liberty of the subject ought to be liberally construed.

The statute of 9 G. 3. discharges all persons in execution under any suit.

There is an end of all the criminal part of the suit.

“ It is declared and enacted ” are the words, which seems as if the statute meant to extend the benefit in the fullest manner.

Therefore I am willing to adopt the liberal construction, the public having been satisfied by the imprisonment ; and especially as otherwise this would be the case of imprisonment without any probability of release—and of a minor.

And whether it has ever come before the court upon motion or not, they will give a liberal and beneficial construction of a statute of this nature.

Mr. Justice *Asbhurst*—It is very strange he should not be discharged because it is a civil suit, not even by a general pardon which is certainly the case ; and then it should be turned against him that it's not a civil suit, but a suit of the crown, and that so the act of parliament does not discharge him.

Held that
attachment
for non-
payment of
costs, on 5 W. & M. c. 11. on an indictment of assault, is discharged by the insolvent act.

CURIA—Let him be DISCHARGED on taking the OATH on the INSOLVENT DEBTORS ACT.

[651]

Elegit.

YOU must revive *elegit* by *scire facias*. If not proceeded upon within the year the writs must be without discontinuance ; otherwise the court will presume satisfaction.

Bail.

ON a motion to set aside execution against bail, with costs, the principal having been discharged by certificate under a commission of bankruptcy.

Mr. *Dunning*—That the motion to set aside execution with costs must infer irregularity ; and that there was none in this case, and therefore costs out of the question. That formerly the bail must have brought in the principal and surrendered : That now, if they apply before they are fixed, they may do this without such form ; but they have not applied. They ought, without notice, to have watched whether

ther a *capias ad satisfaciendum* was taken out against the principal, which of course would end in a *scire facias* against the bail, to charge them.

There is no reason any more than there would have been if the certificate had issued subsequent to the fixing of the bail.

Lord Mansfield—Why did the plaintiff proceed after he had notice of the bankrupt being discharged?

On the other side, Mr. Cowper was going to have argued, but Lord Mansfield told him it was not necessary.

Lord Mansfield—This is a mighty plain case. The bail are to watch the proceedings of the plaintiff; unless upon the ground of their knowing that the plaintiff knows that the defendant has got his certificate. And why, then, does he pursue an iniquitous demand against the bail?

They knew nothing of the *scire facias*. If it were not that they are discharged by the event, they must take notice of the *scire facias* at their peril.

Mr. Dunning hoped the proceedings would be set aside without costs, as being regular.

Lord Mansfield—The proceedings are irregular, as contrary to law and justice. [652]

Mr. Dunning—It is your Lordship's opinion, then, that the certificate of a bankrupt is to amount to a discharge of bail!

Lord Mansfield—Yes; if the plaintiff knows of the certificate, and proceeds.

RULE ABSOLUTE, however, without costs.

But the court desired it might not be taken for a precedent of excusing costs upon the like application for the future.

Mr. Dunning said they had no means of knowing that such a proceeding was not warrantable; they had received no light in it.

Lord Mansfield—They had the light within to tell them. They had no need of any other to shew that it was unjust to come upon them by surprize, when the defendant was discharged, and by that means the bail; and when the certificate had been sued out a year and an half, and the plaintiff had notice.

It was objected by one of the counsel, that, if this was the case, the usual application, that upon pleading to the *scire facias* an *exoneretur* might be entered, would be of no use.

Mr.

Mr. Justice *Aston*—It will not be useless; as it will save them a great deal of expence, which they otherwise may often incur. *

Writ of Error.

ON a motion for a rule to shew cause why execution should not be taken out against all the defendants, notwithstanding a writ of error brought by two of them.

Objection to the motion, that the plaintiff had obtained a confession of damages from three of the defendants in the cause, suspected to be by collusion: That the writ of error exists, and must have its power while it stands.

If it be an irregular writ, the motion should be for a rule to shew cause why the writ should not be set aside.

[653] Lord *Mansfield* declared he would give no directions: They might get rid of the writ of error if they could; if not, that it would be in force.

RULE DISCHARGED.

Time to Plead.

IT seems declaration delivered before the *Essoign* day of the term entitles to a plea within eight days.

Inspection.

MOTION for liberty to inspect books of a corporation.

Objection, that it was so late moved the corporation would not have time to answer.

Lord *Mansfield* asked whether a custom was not concerned.

And I think it turned out to be a custom concerning freemen's fees.

Lord *Mansfield*—They ought to have inspection.

RULE ACCORDINGLY.

Witness.

* *Præstat cautela quam remedium.*

Witness.

MOTION to stay going to trial, on affidavit that they have been endeavouring to find a witness, and cannot.

RULE DISCHARGED.

Irregularity.

WHERE bill filed against one as attorney of this court who is attorney of the Common Pleas, and judgment thereon, this seems error, and not irregularity.

Writ of Error.

[654]

MOTION for execution notwithstanding a writ of error, on suggestion that it issued before judgment signed. Whereas the assignment of general error in writs of error is thus: *Quia in recordo et processu ac etiam in redditione JUDICII manifeste est erratum*, and therefore the writ of error could not anticipate the judgment.

But it was observed the proper way to come at this was by moving to set aside the writ.

And the master said whoever sued out a writ of error had it in his pocket to make use of when judgment should be signed; and the judgment related to the first day of term.
Q. N.

Inspection of Books.

ON a rule to shew cause why the plaintiff should not inspect the books of the corporation of the city of London, and why he should not have liberty to take copies.

This was an action upon a penal statute of 3 G. 3. to prevent persons voting who are not freemen, and oblige those who have the custody, to produce to the candidates or freemen, the books of the corporation containing admissions of freemen.

It was objected, that if the rule were granted in this case, the defendants might be made liable by compulsion to accuse themselves.

To

Trinity Term, 14 Geo. 3. K. B.

To this it was answered, that the application is to the defendants not in their private and personal, but in their political capacity.

However, it appearing the defendants could not comply with the rule, they not having the power of granting inspection in themselves.

RULE DISCHARGED.

Michaelmas

Michaelmas Term,

14 Geo. 3. 1774. K. B.

[655]

The Cause of the Island of Grenada.

Campbell v. Hall.

THIS cause came on to trial before the right honourable *William Lord Mansfield*, on Friday the second of July, at the sittings after Trinity term, for the city of London, at Guildhall, when a special verdict was found: The proceedings in the cause were as follows:

“ Trinity term, in the 13th year of the reign of King
“ *George* the third.

“ London to wit, BE IT REMEMBERED, that heretofore,
“ that is to say, in Easter term last past, before our Lord
“ the King at Westminster, came *Alexander Campbell*, Esq;
“ by *Benjamin Rosewell*, his attorney, and brought in the
“ court of our said Lord the King then there, his BILL against
“ *William Hall*, Esq; being in the custody of the marshal
“ of the Marshalsea of our said Lord the King, before the
“ King himself, of a plea of TRESPASS on the case; and

Com-
mence-
ment by
bill.

“ there are PLEDGES for the prosecution, to wit, *John Doe*
“ and *Richard Roe*. Which said BILL follows in these words,
“ to wit, London, to wit, ALEXANDER CAMPBELL, Esq;
“ complains of WILLIAM HALL, Esq; being in the cus-
“ tody of the marshal of the Marshalsea of our Lord the

Plea of
trespass.
Pledges.
Recital of
bill.

“ King himself, of a plea [of trespass on the case; AND
“ ALSO] FOR THAT WHEREAS the said *William*, on the

Ac etiam.

“ first day of January, in the year of our Lord 1773, at
“ London aforesaid, to wit, in the parish of St. Mary-Le-
“ Bow, in the ward of Cheap, was indebted to the said

Indebita' us.

“ *Alexander* in the sum of 20l. of lawful money of Great
“ Britain, for the like sum of money by the said *William*
“ before that time had and received, for and to the use of
“ the said *Alexander*: And being so indebted, he the said

Y y

“ *William*,

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Affumfit. " *William*, in consideration thereof, afterwards, to wit, on
 [656] " the same day and year aforesaid, at London aforesaid, in
 " the parish and ward aforesaid, undertook, and to the
 " said *Alexander* then and there faithfully promised, that he
 " the said *William* would well and truly pay and satisfy the
 " said *Alexander* the said sum of money whenever he the said
 " *William* should be thereunto afterwards required. YET
 " the said *William*, not regarding his said promise and
 " undertaking, but contriving and fraudulently intending
 " craftily and subtilly to deceive the said *Alexander* in this
Breach assigned. " behalf, HATH NOT PAID the said *Alexander* the said
 " sum of money, or any part thereof, (although the said
 " *William* afterwards, to wit, on the same day and year
 " aforesaid, and often afterwards, at London aforesaid, in
 " the parish and ward aforesaid, was by the said *Alexander*
 " required to do) but to pay the same, or any part thereof,
 " to the said *Alexander* he the said *William* hath hitherto
Damages. " altogether refused, and still doth refuse, to the DAMAGE
 Igitur apponit factam. " of the said *Alexander* of TWENTY POUNDS. And there-
 " fore he brings his SUIT, &c."

Continuance. AND now on this day, to wit, on Friday next after the
 morrow of the Holy Trinity, in the same term, (to which
 said day the said *William* had leave to imparle to the said bill,
 and then to answer, &c.) before our Lord the King at West-
 minster, comes as well the said *Alexander*, by his attorney
 aforesaid, as the said *William*, by *Robert Want*, his attor-
Defendant vim et inju- riam. " nery; and the said *William* defends the wrong and injury.
Plea of non- When, &c. and says he did not undertake and promise in
assumpfit. manner and form as the said *Alexander Campbell* above
Defendant complains against him. And of this he puts himself upon
point se su- the COUNTRY; and the said *Alexander* doth the like.
per patriam.

Plaintiff si- Therefore let a jury thereupon come before our Lord the
militer King on Wednesday next after three weeks of the Holy
issue. Trinity, by whom the truth of the matter may be better
 known, [and who neither are of kin to the aforesaid *Alex-*
Veniat ju- *ander* nor to the aforesaid *William*] to recognize the truth
rata. of the issue between the said parties, because as well the said
Alexander as the said *William*, between whom the issue is,
Day of far- have put themselves upon the said jury. The same day is
ther appear- given to the party aforesaid.
ance.

Respite for Afterwards the process being continued between the par-
default of ties aforesaid, of the plea aforesaid, by the jury between
jurors them being respited (before our Lord the King, at West-
Nisi prius. minster, until Saturday next after the morrow of All Souls
 then next following, UNLESS the King's right trusty and
 well

well beloved *William*, Lord *Mansfield*, his Majesty's Chief Justice assigned to hold pleas before our Lord the King himself, shall first come on Friday the second day of July, at the Guildhall of the city of London, according to the form of the statute in such case made and provided) for default of jurors, because none of them did appear.

At which day, before our Lord the King at Westminster, Continued.
came the aforesaid *Alexander Campbell*, by the said *Benjamin*

Roswell, his attorney aforesaid. And the said Chief Justice before whom issue was tried, sent hither his record had [657]

in these words, to wit, " Afterwards, that is to say, on the Postea.
" day and at the place within contained, before the right
" honourable *William*, Lord *Mansfield*, the Chief Justice
" within written, *John Way*, gentleman, being associated
" unto him according to the form of the statute in that case
" made and provided, comes as well the within named *Alex-*
" *ander Campbell*, Esq; by his attorney within named, as
" the within named *William Hall*, Esq; by his attorney
" within mentioned.

" And the JURORS of the jury within mentioned being
" summoned, some of them, that is to say, *Anthony High-* Names of
" *more*, *Peter Bostock*, *David Chambers*, *James La Motte*, the jurors.
" *John Wilkinson*, *Jesbua Bedshaw*, and *Silvanus Grove*,
" come, and are sworn upon that jury: And because the
" residue of the jurors of the same jury do not appear,

" therefore other persons, of those standing by the court,
" by the sheriffs of the city and county aforesaid, at the Tales de
" request of the said *Alexander*, and by the command of circumstan-
" the said Chief Justice, are now newly set down, whose tibus.
" names are filed in the within written pannel, according to
" the form of the statute in that case made and provided.

" Which said jurors, so newly set down, that is to say,
" *John Lee*, *William Kerfil*, *Charles Hougham*, *John Ger-*
" *man*, and *Richard Hatt*, being required, come, who,
" together with the said other jurors before impannelled,
" and sworn to declare the truth of the within contents,
" being elected, tried, and sworn, upon their oaths say,

" That the island of Grenada, in the West Indies, was Special ver-
" in the possession of the French king until it was conquer- dict.
" ed by the British arms in 1762. And that during that Island of
" possession there were certain customs and impost duties Grenada in
" collected upon goods imported and exported into and out the possesi-
" of the said island, under the authority of his most Chris- on of the
" tian Majesty. And that in the said year 1762 the said French
" island was conquered by the King of Great Britain, then king till
" conquered
" by Great
" Britain in
" 1762.

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Customs and duties upon goods imported and exported levied upon the island by the French king. Surrender of the island of Grenada upon the same terms as Martinico.

“ in open war with the French King: And that the said island of Grenada surrendered to the British arms upon the same articles of capitulation as had been before granted to the inhabitants of the island of Martinico, upon the surrender thereof to the British arms. And that in the articles of capitulation demanded by and granted to the inhabitants of the said island of Martinico, upon the surrender thereof to the British arms, dated the seventh day of February, 1762, are the following articles, that is to say,

Articles in the capitulation of Martinico. Article 4.

Article the fourth—“ They shall be strictly neuter, and shall not be obliged to take arms against his most Christian Majesty; nor even against any other power.”

[658] They become subjects of his Britannic Majesty.

Answer—“ They become subjects of his Britannic Majesty, and must take the oath of allegiance, but shall not be obliged to take arms against his most Christian Majesty until a peace may determine the fate of the land.”

Article 5.

Article the fifth—“ They shall preserve their civil government, their laws, customs, and ordinances: Justice shall be administered by the same officers who are now in employment; and there shall be a regulation made for the interior police between the governor of his Britannic Majesty and the inhabitants: And in case that at peace the island shall be ceded to the King of Great Britain, it shall be allowed to the inhabitants to prefer their political government, and to accept that of Antigua or St. Christopher's.”

They shall be governed by their present laws until his Majesty's pleasure be known.

Answer—“ They become British subjects, (as in the preceding article) but shall continue to be governed by their present laws until his Majesty's pleasure be known.”

Article 6.

Article the sixth—“ The inhabitants, as also the religious orders, of both sexes, shall be maintained in the property of their effects, moveable and immoveable, of what nature soever, and shall be preserved in their privileges, rights, honours, and exemptions; their free negroes and mulattoes shall have the entire enjoyment of their property.”

They shall have the enjoyment

Granted, in regard to the religious orders—“ The inhabitants, being subjects of Great Britain, will enjoy the property

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“ properties, and the same privileges as in the other his Majesty’s Leeward Islands.”

of their property as his Majesty’s subjects.

jects, and the same privileges as the inhabitants of his Majesty’s other Leeward Islands.

Article the seventh—“ They shall not pay to his Majesty any other duties than those which have been paid hitherto to his most Christian Majesty; and the capitation of negroes upon the same footing it is paid at present, without any other charges or imposts: And the expences of justice, pensions to curates, and other occasional expences, shall be paid by the domain of his Britannic Majesty, as they were by that of his most Christian Majesty.”

Article 7. To pay to his Majesty no other duties than those before paid to the French king.

Answered in the sixth article, as to what regards the inhabitants.

Referred for answer to the 6th article.

Article the eleventh—“ No other than the inhabitants resident in this island shall, till the peace, possess any estate by acquisition, agreement or otherwise: But in case at the peace the country shall be ceded to the King of Great Britain, then it shall be permitted to the inhabitants who shall not be willing to become his subjects to sell their estates, moveable and immoveable, to whom they please, and retire where they shall think proper; in which case they shall be allowed convenient time.

“ [Answer] All subjects of Great Britain may possess any lands or houses by purchase. The remainder of this article granted, provided they sell to British subjects.”

Article 11.

[659] In case of a peace, if the country shall be ceded to the King of Great Britain, those who please may sell their estates to British subjects.

jects, and retire out of the island.

And the jurors aforesaid, upon their oaths aforesaid further say—That in the definitive treaty of peace and friendship between his Britannic Majesty, the most Christian King and the King of Spain, concluded at Paris the 10th day of February 1763, amongst others are the following articles:

Definitive treaty of peace between the King of Great Britain, the French King, and the King of Spain 10th Febr. 1763.

Article the fourth—“ His most Christian Majesty renounces all pretensions which he has heretofore formed, or might form to Nova Scotia, or Acadia, in all its parts; and guarranties the whole of it and with all its dependencies to the King of Great Britain: Moreover his most Christian

Article 4th. Cession of Nova Scotia, Canada, and all the dependencies of each to the King and

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crown of
Great Bri-
tain.

“ Christian Majesty cedes and guaranties to his said Britan-
 “ nic Majesty in full right Canada, with all its dependen-
 “ cies, as well as the island of Cape Breton, and all the
 “ other islands and coasts in the Gulph and River of St.
 “ Lawrence. And in general every thing that depends on
 “ the said countries, lands, islands and coasts, with the so-
 “ vereignty, property, possession, and all rights acquired
 “ by treaty or otherwise, which the most Christian King
 “ and the crown of France have had until now over the
 “ said countries, islands, lands, places, coasts, and their
 “ inhabitants: So that the most Christian King cedes and
 “ makes over the whole to the said King and the crown of
 “ Great Britain; and that in the most ample manner and
 “ form without restriction, and without any liberty to depart
 “ from the said cession and guaranty under any pretence,
 “ or to disturb Great Britain in the possessions above men-
 “ tioned—His Britannic Majesty on his side agrees to grant
 “ the liberty of the catholic religion to the inhabitants of
 “ Canada: He will consequently give the most precise and
 “ effectual orders, that his new Roman Catholic subjects
 “ may profess the worship of their religion, according to
 “ the rights* of the Romish church, so far as the laws of
 “ Great Britain can permit—His Britannic majesty further
 “ agrees that the French inhabitants or others who had
 “ been subjects of the most Christian King in Canada, may
 “ retire with all safety and freedom wherever they shall
 “ think proper, and may sell their estates provided it be to
 “ subjects of his Britannic Majesty, and bring away their
 “ effects as well as their persons without being restrained in
 “ their emigration under any pretence, except that of debts
 “ or criminal prosecutions. The term limited for this emi-
 “ gration, shall be fixed to the space of eighteen months to
 “ be computed from the day of the exchange of the ratifi-
 “ cations of the present treaty.”

* Qu. rites.

[660]

Article 9th.
Cession of
Grenada,
&c. to the
King of
Great Bri-
tain.

Article the ninth—“ The most Christian King cedes and
 “ guarantees to his Britannic Majesty in full right the is-
 “ lands of Grenada, with the same stipulations in favour of
 “ the inhabitants of this colony, inserted in the fourth arti-
 “ cle for those of Canada. And the partition of the is-
 “ lands called Neutral is agreed and fixed: so that those of
 “ St. Vincent, Dominica, and Tobago, shall remain in
 “ full right to Great Britain, and that of St. Lucia shall
 “ be delivered to France, to enjoy the same likewise in full
 “ right. And the high contracting parties guaranty the
 “ partition so stipulated.”

And

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And the jurors aforesaid upon their oaths aforesaid further say, that his Majesty, by his royal proclamation bearing date at Westminster the 7th day of October, 1703, amongst other things declared as follows, “ And whereas it will greatly contribute to the speedy settling our said new government, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof; we have thought fit to publish and declare, by this our proclamation, that we have, in the letters patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that, so soon as the state and circumstances of the said colonies, will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said government respectively, in such manner and form as is used and directed in those colonies and provinces in America, which are under our immediate government. —And we have also given power to the said governors, with the consent of our said councils and the representatives of the people, so to be summoned as aforesaid, to make constitutions and ordain laws, statutes and ordinances, for the public welfare and good government of our said colonies and of the people and inhabitants thereof, as near as may be. agreeable to the laws of England and under such regulations and restrictions as are used in other countries. And in the mean time and until such Assemblies can be called as aforesaid, all persons inhabiting in, or resorting to our said colonies, may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England: for which purpose we have given power under our great seal to the governors of our said colonies respectively to erect and constitute, with the advice of our said councils respectively courts of judicature and public justice within our said colonies, for the hearing and determining all causes as well criminal as civil according to law and equity, and as near as may be agreeable to the laws of England; with liberty to all persons who may think themselves aggrieved by the sentences of such courts in all civil causes to appeal, under

Proclamation of the King of Great Britain, 7th of October 1703, promising a legislative assembly as soon as the state and circumstances of the new governments will admit; and that in the mean while persons inhabiting or resorting may confide in the royal protection for the enjoyment of the benefit of the laws of England; for the administration of which courts of justice ordered to be erected.

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Proclamation 26th March 1764, declaring a survey ordered for the division of the island of Grenada, &c. into proper parishes and districts; and for providing for the more beneficial culture of the said island, &c.

“ der the usual limitations and restrictions, to us in our privy council.”

And the jurors aforesaid, upon their oaths aforesaid, further say—That his Majesty by his royal proclamation bearing date at Westminster, the 26th day of March 1764, amongst other things did also declare as follows, “ Whereas we have
 “ taken into our consideration the great benefit that will
 “ arise to the commerce of our kingdoms and the interest
 “ of our subjects, from the speedy settlement of the islands of Grenada, the Grenadines, Dominica, St. Vincent and Tobago, we do therefore think fit, with the
 “ advice of our privy council, to issue this our royal proclamation, to publish and declare to our loving subjects
 “ that we have, with the advice of our said privy council, given the necessary powers and directions, for an immediate survey, and division into proper parishes and districts, of such of the said islands as have not hitherto
 “ been so surveyed and divided; and for laying out such lands in the said islands as are in our power to dispose of
 “ into allotments for plantations of different size and extent, according as the nature of the land shall be more
 “ or less adapted to the growth of sugar, coffee, cocoa, cotton, or other articles of beneficial culture; reserving
 “ to us, our heirs and successors, such parts of the said islands as shall be necessary for erecting fortifications thereon, and for all other military purposes; for glebes
 “ for ministers, allotments for school-masters, for woodlands, high-roads, and all other public purposes: And
 “ also reserving such lands in our islands of Dominica and St. Vincent, as at the time of the surrender were and
 “ still are in the possession of the French inhabitants of the said islands; which lands it is our will and pleasure
 “ should be granted to such of the said inhabitants as shall be inclined to accept the same upon leases for terms absolute, or for renewable terms upon certain conditions, and under proper restrictions. And we do hereby further publish and declare, that the allotments for plantations in our islands of Grenada, the Grenadines, Tobago, and St. Vincent, shall contain from one hundred
 “ to three hundred acres, with some few allotments in each island of five hundred acres; and that the allotments in
 “ our island of Dominica, which is represented to be not so well adapted to the cultivation of sugar, and which
 “ from its situation requires in policy to be well peopled
 “ with

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“ with white inhabitants, shall be in general from fifty to
 “ an hundred acres.—That each purchaser of lands which
 “ have been cleared and improved, shall within the space
 “ of three months from the date of the grant settle and
 “ constantly keep upon the lot purchased one white man or
 “ two white women, for every hundred acres contained in
 “ the said lot, and in default thereof shall be subject to the
 “ payment of 20*l. per annum* for every white woman, and [662]
 “ 40*l. per annum* for every white man, that shall be want-
 “ ing to complete the number. That the purchaser of un-
 “ cleared lands shall clear and cultivate one acre in every
 “ twenty in each year, until half the land so purchased shall
 “ be cleared, and in default thereof shall pay 5*l. per annum*
 “ for every acre not cleared pursuant to such condition. And
 “ such purchaser shall also be obliged to settle and con-
 “ stantly keep upon the lot so purchased, one white man or
 “ two white women for every hundred acres as the same
 “ shall be cleared. That each purchaser, besides the pur-
 “ chase money, shall be subject to the payment of an an-
 “ nual quit-rent to us, our heirs and successors, of six-pence
 “ *per acre*, under the penalty of 5*l. per acre* upon non-
 “ payment thereof. Such quit-rents in the case of the pur-
 “ chase of cleared lands to commence from the date of the
 “ grant, and the first payment to be made at the expiration
 “ of the first year; and in case of the purchase of the un-
 “ cleared lands, such quit-rents to commence at the expira-
 “ tion of twelve months from the time each acre is cleared.
 “ That in case of failure in the payment of the purchase
 “ money in the manner above directed, the purchaser shall
 “ forfeit all right to the lands purchased.”

And the jurors aforesaid, upon their oaths aforesaid, fur-
 ther say, That his Majesty by his letters patent, under his
 writ of privy seal bearing date at Westminster, the 9th day
 of April 1764, appointed *Robert Melville, Esq;* Captain
 General and Governor in Chief in and over the islands of
 Grenada, the Grenadines, Dominica, St. Vincent, and
 Tobago, in America; and of all other islands and territories
 adjacent thereto: Which said letters patent are as follows.—

Letters pa-
 tent, 9th
 of April
 1764, ap-
 pointing
 Robert
 Melville,
 Esq; Go-
 vernor of
 Grenada.

“ George the third by the grace of God, of Great Britain,
 “ France and Ireland, King defender of the faith, &c. To
 “ our trustee and well beloved *Robert Melville, Esq;* greet-
 “ ing: Whereas we did by our letters patent under our
 “ great seal of Great Britain, bearing date at Westminster,
 “ the 4th day of April, in the first year of our reign con-
 “ stitute

[663]

To govern
according
to his in-
structions,
and accord-
ing to such

“stitute and appoint *Charles Pinfold*, Esq; Captain-Gen-
“ral and Governor in Chief in and over our islands of
“Barbadoes, St. Lucia, Dominica, St. Vincent, Tobago,
“and the rest of our islands, colonies and plantations, in
“America, commonly called or known by the name of our
“Caribbee islands, lying and being to the windward of Gur-
“daloupe, and which then were or after should be under
“our subjection and government, during our will and plea-
“sure, as by the said recited letters patent, relation being
“thereunto had, may more fully and at large appear:
“Now know you that we have revoked and determined,
“and by these presents do revoke and determine, such part
“and so much of the said recited letters patent, and every
“clause, article and thing therein contained as relates to
“or mentions the islands of St. Lucia, Dominica, St. Vin-
“cent, and Tobago. And further know you, that we,
“reposing especial trust and confidence in the prudence
“courage and loyalty, of you the said *Robert Melville*, of
“our especial grace, certain knowledge, and meer motion,
“have thought fit to constitute and appoint, and by these
“presents do constitute and appoint, you the said *Robert*
“*Melville* to be our Captain-General and Governor in Chief,
“in and over our islands of Grenada, the Grenadines,
“Dominica, St. Vincent, and Tobago, in America, and of
“all other islands and territories adjacent thereto, and which
“now are or heretofore have been dependant thereupon.
“And we do hereby require and command you to do and
“execute all things in due manner, that shall belong to
“your said command, and the trust we have reposed in you
“according to the several powers and directions granted or
“appointed you by this present commission, and the in-
“structions and authorities herewith given to you, or by
“such further powers, instructions and authorities, as
“shall at any time hereafter be granted or appointed you,
“under our signet and sign manual, or by our order in our
“privy council, and according to such reasonable laws and
“statutes as shall hereafter be made and agreed upon by
“you, with the advice and consent of the council and as-
“sembly of the islands and plantations under your govern-
“ment, in such manner and form as is herein after ex-
“pressed. And our will and pleasure is that you the said
“*Robert Melville* do, after the publication of these our let-
“ters patent, and after the appointment of our council for
“our said islands, in such manner and form as is prescribed
“in

“ in the instructions which you will herewith receive, in
“ the first place take the oaths appointed to be taken by an
“ act passed in the first year of the reign of King *George*
“ the first, entitled, “ An act for the further security of his
“ Majesty’s person and government, and the succession of
“ the crown in the heirs of the late Princess *Sophia*, being
“ Protestants; and for extinguishing the hopes of the pre-
“ tended Prince of *Wales* and his open and secret abettors :”
“ As also that you make and subscribe the declaration men-
“ tioned in an act of parliament made in the 25th year of
“ the reign of King *Charles* the second, intituled, ‘ An act
“ for preventing dangers which may happen from Popish re-
“ cufants.’—And likewise that you take the oath usually
“ taken by governors in the other colonies, for the due exe-
“ cution of the office and trust of our Captain-General and
“ Governor in Chief in and over our said islands, and for
“ the due and impartial administration of justice.—And fur-
“ ther that you take the oath required to be taken by the go-
“ vernors of the plantations to do their utmost, that the
“ several laws relating to trade and the plantations be duly
“ observed; which said oaths and declaration our council
“ of our said islands, or any three of the members thereof,
“ have thereby full power and authority, and are required,
“ to tender and administer to you: And in your absence
“ to our Lieutenant-General of the said islands, and to
“ our Lieutenant-Governors of each of our said islands res-
“ pectively, the said oaths mentioned in the said act intituled,
“ ‘ An act for the further security of his Majesty’s person and
“ government, and the succession of the crown in the heirs
“ of the late Princess *Sophia*, being protestants, and for ex-
“ tinguishing the hopes of the pretended Prince of *Wales*,
“ and his open and secret abettors;’ As also cause them to
“ make and subscribe the aforesaid declaration, and to admi-
“ nister unto them the usual oaths for the due execution
“ of their places and trusts.—And we do further give and
“ grant unto you the said *Robert Melville*, full power and
“ authority from time to time, and at any time hereafter,
“ by yourself, or by any other to be authorized by you in
“ this behalf, to administer and give the oaths mentioned
“ in the said act, for the further security of his Majesty’s
“ person and government, and the succession of the crown
“ in the heirs of the late Princess *Sophia*, being Protestants,
“ and for extinguishing the hopes of the pretended Prince
“ of *Wales*, and his open and secret abettors, to all and
“ every

reasonable
laws as shall
be made,
with the
advice and
consent of
the council
and assen-
bly.

“ every such person and persons as you shall think fit, who
 “ shall at any time or times pass into any of our said is-
 “ lands, or shall be resident or abiding there.

“ And we do hereby authorize and empower you to keep
 “ and use the public seal, which will be herewith delivered
 “ to you, or shall hereafter be sent to you, for sealing all
 “ things whatsoever that shall pass the great seal of our said
 “ island.

Power and
 authority,
 with the
 advice of
 council, as
 soon as cir-
 cumstances
 shall admit,
 and as often
 as need
 shall re-
 quire, to
 call gene-
 ral assem-
 blies.

“ And we do hereby give and grant unto you the said *Ro-
 bert Melville*, full power and authority, with the advice
 “ and consent of our said council to be appointed as afore-
 “ said, as soon as the situation and circumstances of our
 “ islands under your government will admit thereof, and
 “ when and as often as need shall require, to summon and
 “ call general assemblies of the freeholders and planters
 “ jointly or severally within any of the islands under your
 “ government, in such manner as you in your discretion
 “ shall judge most proper, or according to such further
 “ powers, instruction or authorities, as shall be at any
 “ time hereafter granted or appointed you under our signet
 “ and sign manual, or by our order in our privy council.

Persons
 duly elect-
 ed by the
 major part
 of the free-
 holders to
 take the
 oaths, &c.

“ And our will and pleasure is that the persons thereupon
 “ duly elected by the major part of the freeholders of the
 “ respective parishes or precincts, and so returned, shall be-
 “ fore their sitting take the oaths mentioned in the said act
 “ intitled, ‘ An act for the further security of his Majes-
 “ ty’s person and government, and the succession of the
 “ crown in the heirs of the late Princess *Sophia*, being Pro-
 “ testants, and for extinguishing the hopes of the pretended
 “ Prince of *Wales*, and his open and secret abettors:’ As
 “ also make and subscribe the aforementioned declaration,
 “ which oaths and declaration you shall commissionate fit
 “ persons under the public seal of those our islands to ten-
 “ der and administer unto them: And until the same shall

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And then
 so elected
 and qualifi-
 ed to be
 called and
 deemed the
 assembly of
 the island,
 or the as-
 sembly of
 the said is-
 lands in ge-
 neral. The
 govern-
 ment

“ be so taken and subscribed, no person shall be capable of
 “ sitting, though elected. And we do hereby declare, that
 “ the persons so elected and qualified shall be called and
 “ deemed the assembly of that island within which they
 “ shall be chosen, or the assembly of our said islands in ge-
 “ neral. And that you the said *Robert Melville*, by and
 “ with the advice and consent of our said council and as-
 “ sembly or assemblies, or the major part of them, shall
 “ have full power and authority to make, constitute, and
 “ ordain laws, statutes, and ordinances, for the public
 “ peace, welfare, and good government of our said islands,
 “ jointly

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“ jointly or severally, and of the people and inhabitants
 “ thereof, and such others as shall resort thereunto, and
 “ for the benefit of us, our heirs and successors. Which
 “ said laws, statutes, and ordinances, are not to be repug-
 “ nant, but as near as may be, agreeable to the laws and sta-
 “ tutes of this our kingdom of Great Britain. Provided,
 “ that all such laws, statutes, and ordinances, of what
 “ nature or duration soever, be, within three months or
 “ sooner after the making thereof, transmitted to us, un-
 “ der our seal of our said islands, for our approbation or dis-
 “ allowance of the same; as also duplicates thereof by the
 “ next conveyance.

and coun-
 cil, with
 the said as-
 sembly or
 assemblies,
 to have full
 power to
 make laws
 for the said
 islands
 jointly or
 severally.

“ And in case any or all of the said laws, statutes, and
 “ ordinances, not before confirmed by us, shall at any time
 “ be disallowed, and not approved, and so signified by us,
 “ our heirs and successors, under their signet or sign ma-
 “ nual, or by order of our or their privy council, unto
 “ you the said *Robert Melville*, or to the commander in
 “ chief of the said islands for the time being, then such
 “ and so many of the said laws, statutes, and ordinances,
 “ as shall be so disallowed and not approved, shall from
 “ thenceforth cease, determine, and become utterly void
 “ and of no effect, any thing to the contrary thereof not-
 “ withstanding.

“ And to the end that nothing may be passed or done by
 “ our said council or assemblies to the prejudice of us, our
 “ heirs and successors, we will and ordain that you the said
 “ *Robert Melville* shall have and enjoy a negative voice in
 “ the making and passing all laws, statutes, and ordi-
 “ nances, as aforesaid. And that you shall and may like-
 “ wise, from time to time, as you shall judge necessary,
 “ adjourn, prorogue or dissolve, all general assemblies as
 “ aforesaid.”

And the jurors aforesaid, on their oaths aforesaid, far-
 ther say, That his Excellency *Robert Melville*, Esq; arrived
 in Grenada on the fourteenth of December, 1764, and, in
 consequence of the last mentioned letters patent, took up-
 on him the government of the same, and of the other is-
 lands therein named. And that, in consequence of the
 last mentioned letters patent, a meeting of the * governor,
 council, and assembly of the said island of Grenada was
 held there in the latter end of the year 1765.

Arrival of
 governor
 Melville in
 Grenada 14
 Dec. 1764.
 In conse-
 quence of
 the letters
 patent a
 meeting of
 the gover-
 nor, coun-
 cil, and as-
 sembly, held in the latter end of the
 year 1765.
 [*666]

sembly, held in the latter end of the

And

His Majesty's letters patent, dated 20th of July, 1764, ordering and appointing an impost or custom of four and an half per cent. in specie for every hundred weight upon all dead commodities of the produce of the island of Grenada that should be shipped off from the same, in lieu of all customs and imposts before collected upon goods imported and exported under the authority of the French King. The letters patent reciting that such impost is paid by Barbadoes

And that his Majesty, by his letters patent under the great seal of Great Britain, bearing date at Westminster the twentieth day of July, in the fourth year of his reign, and in the year of our Lord 1764, did order, direct and appoint, that an impost or custom of four and a half *per cent.* in specie should, from and after the 29th day of September then next ensuing, be raised and paid to his heirs and successors, for and upon all dead commodities of the growth and produce of the said island of Grenada that should be shipped off from the same, in lieu of all customs and impost duties to that time collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty. Which said letters patent are in the words following: "George the third, by the grace of God, of Great Britain, France and Ireland, King defender of the faith, &c. to all to whom these presents shall come, greeting: Whereas a certain impost or custom of four pounds and an half in specie for every hundred weight of the commodities of the growth and produce of the island of Barbadoes, and of the Leeward Caribbee islands in America, shipped off from the same, or any of them, is paid and payable to us, our heirs and successors; and whereas the island of Grenada was conquered by us during the late war, and has been ceded and secured to us by the late treaty of peace; and where- as it is reasonable and expedient, and of importance to our other Sugar islands, that the like duty should take place in our said island of Grenada; we have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal order, direct and appoint, that an impost or custom of four and an half *per cent.* in specie shall, from and after the 29th day of September next ensuing the date of these presents, be raised and paid to us, our heirs and successors, for and upon all dead commodities of the growth or produce of our said island of Grenada that shall be shipped off from the

and the Leeward islands of America; and reciting the conquest of Grenada, and the cession thereof by the peace of Paris; and that it is reasonable, expedient, and of importance to the other Sugar islands, that the like should take place on the island of Grenada, and appointing, as above set forth, and under claim of the prerogative royal an impost of four and an half per cent, in specie for every hundred weight of dead commodities, the produce of the island of Grenada, that shall be shipped off from them, in lieu of all customs, &c. as above, to be collected and paid in such manner and means, and under such penalties and forfeitures, as in the island of Barbadoes and the Leeward islands.

" same;

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“ same ; in lieu of all customs and impost duties hitherto
 “ collected upon goods imported and exported into and
 “ out of the said island under the authority of his most
 “ Christian Majesty : And that the same shall be collected,
 “ paid, and levied in such manner and by such means, and
 “ under such penalties and forfeitures as the said impost
 “ or custom of four and an half per cent. is, and may now
 “ be collected, paid, and levied in our said island of Barba-
 “ does, and our said Leeward islands.

“ And we do hereby require and command the present [667]
 “ governor or commander in chief, and the governor or
 “ commander in chief for the time being, and the officers
 “ of our customs in the said island of Grenada, now and
 “ hereafter, for the time being, and all others whom it
 “ may concern, that they do respectively take care to col-
 “ lect, levy, and to receive the said impost or custom, ac-
 “ cording to our royal will and pleasure, signified by these
 “ presents.

Command-
 ing the go-
 vernor and
 officers of
 the cus-
 toms, now
 and hereaf-
 ter, for the
 time being,
 to collect
 and receive
 the said impost.

“ And whereas a poll-tax was levied and paid by the in-
 “ habitants of our said island of Grenada whilst it was un-
 “ der subjection to his most Christian Majesty, it is our
 “ royal will and pleasure that such poll-tax as was levied,
 “ collected and paid by the inhabitants of the said island
 “ whilst it was under subjection to his most Christian Ma-
 “ jesty, shall be continued therein during our royal will
 “ and pleasure; and that the same shall be collected, le-
 “ vied, and paid to us, our heirs and successors, at such
 “ times and in such manner, and by such ways and means
 “ and under such penalties and forfeitures, and upon such
 “ terms, and with such privileges and exemptions as the
 “ same was collected, levied, and paid whilst the said island
 “ was under such subjection to his most Christian Majesty,
 “ in as much as the same are not contrary to the laws of
 “ Great Britain.

And ap-
 pointing
 the conti-
 nuance of
 the poll-
 tax paid by
 the inhabi-
 tants of
 Grenada
 while un-
 der subjec-
 tion to the
 crown of
 France; to
 be collect-
 ed, levied,
 and paid in
 such man-
 ner and by
 such means,
 and with
 such penal-
 ties and forfeitures, and with such privileges and exemptions as whilst it was under such
 objection, in as much as the same are not contrary to the laws of Great Britain.

“ And that the account and number of the inhabitants
 “ and slaves therein shall be, from time to time, kept and
 “ delivered in by such person or persons, and at such
 “ delivered, from time to time, in such manner and by such persons, and with such penal-
 ties, &c. as when the island was in subjection to France, in as much as the same are
 not contrary, as above.

And an ac-
 count of the
 inhabitants
 to be taken,
 kept and

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“ time and times, and under such regulations, sanctions,
 “ penalties and forfeitures respectively, as and under which
 “ the same were taken, kept and delivered in during the
 “ time the said island was subject to his most Christian
 “ Majesty, as aforesaid, in as much as the same are not
 “ contrary to the laws of Great Britain.

“ And we do hereby require and command the present
 “ governor or commander in chief, for the time being, of
 “ our said island of Grenada, and the several officers of our
 “ revenue, now, and for the time being, and all others
 “ whom it may concern, that they do respectively take care
 “ to collect, levy, and receive the money arising and to arise
 “ by the said tax, and to pay and account for the same to
 “ the receiver general and collector of our casual revenue
 “ in our said island, for the time being, according to our
 “ royal will and pleasure signified by these presents.”

Registry of
 the said let-
 ters patent.
 Publication
 of the said
 letters Jan.
 1765.

Which said letters patent were afterwards duly registred
 in the said island, and were publicly announced by his Ex-
 cellency *Robert *Melville*, Esq; in the month of January,
 1765, immediately succeeding his arrival in the said island of
 Grenada.

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 And the
 jury find
 that before
 the making
 of the said
 letters pa-
 tent the

And the jurors aforesaid, upon their oaths aforesaid, far-
 ther say, That the said duty of four and a half per cent. be-
 fore the making of the said last mentioned letters patent,
 was and yet is paid in the island of Barbadoes, and the Lee-
 ward Caribbee islands, in pursuance or by virtue of acts
 of assembly passed in the same islands hereinafter set forth.

said duty of four and an half per cent. was and yet is paid in the island of Barbadoes
 and the Leeward islands, in pursuance or by virtue of acts of assembly hereinafter set
 forth.

Act of Bar-
 badoes 12
 Sept. 1763,
 for settling
 an impost
 on the
 commodi-
 ties of the
 growth of
 that island;
 reciting the

And the jurors aforesaid, upon their oaths aforesaid, far-
 ther say, That by an act of assembly of the island of Bar-
 badoes, in the West-Indies, passed in the said island on the
 twelfth day of September, 1663, entitled, “ An act for
 “ settling an impost on the commodities of the growth of
 “ that island,” it is amongst other things recited and en-
 acted as follows :

grant of Car. 1. of the proprietary government of the said island of Barbadoes to the
 Earl of Carlisle ; and that Car. 2. had invested himself by purchase in all the rights of
 the said Earl in the said island, and had taken the island under his protection, and by
 letters patent of the 12th of June in the same year 1663, had appointed Francis Lord Wil-
 loughby de Parham governor of Barbadoes, and of all the Caribbee islands ; and re-
 citing that by virtue of the said Earl of Carlisle’s patent divers governors and agents
 were sent over with authority to make grants to such persons as they should think
 fit, which they performed ; and reciting the loss of many.

“ Whereas

“ Whereas our late Sovereign Lord *Charles* the first, of
 “ blessed memory, did, by his letters patent under the
 “ great seal of England, grant and convey unto *James*,
 “ Earl of *Carlisle*, and his heirs for ever, the propriety of
 “ this island of Barbadoes; and his sacred Majesty that
 “ now is having by purchase invested himself in all the
 “ rights of the said Earl of *Carlisle*, and in all other rights
 “ which any other person may claim from that patent, or
 “ any other, and thereby more immediately and particu-
 “ larly hath * taken this island unto his royal protection:
 “ And his most excellent Majesty having, by letters patent
 “ under the great seal of England, bearing date the twelfth
 “ of June, in the fifteenth year of his reign, appointed
 “ his Excellency *Francis* Lord *Willoughby*, of *Parham*, cap-
 “ tain general and chief governor of Barbadoes, and all
 “ the Carribbee islands, with full power and authority to
 “ grant, confirm, and assure to the inhabitants of the
 “ same, and their heirs for ever, all lands, tenements, and
 “ hereditaments, under his Majesty’s great seal appointed
 “ for Barbadoes, and the rest of the Carribbee islands, as
 “ relation being thereunto had, may and doth more at
 “ large appear.

“ And whereas, by virtue of the said Earl of *Carlisle*’s
 “ patent, divers governors and agents have been sent over
 “ hither with authority to lay out, set, grant, or convey
 “ in parcels the land within this island, to such persons as
 “ they should think fit, which was by them, in their re-
 “ spective times, as much as in them lay, accordingly per-
 “ formed. And whereas many have lost their grants, * war-
 “ rants, and other evidences for the said lands, and others,
 “ by reason of the ignorance of those times, want suffici-
 “ ent and legal words to create inheritances to them and
 “ their heirs; and others that never recorded their grants
 “ and warrants; and others that can make no proof of any
 “ grants or warrants they ever had for their lands, and yet
 “ have been long and quiet possessors of the same, and
 “ bestowed great charges thereon. And whereas the ac-
 “ knowledgment of forty pounds of cotton per head, and
 “ other taxes and compositions formerly raised to the Earl
 “ of *Carlisle* was held very heavy. For a full remedy for

The want
of legal
words of
conveyance
in some;
the want of
having been
registered
in others;
and the
long and
quiet pos-
session of
others, with
great
charges,
but with-

out evidence of title; and reciting the acknowledgment of 40 pounds of cotton, as a
 poll-tax, with other compositions, raised to the Earl of *Carlisle*, to have been held ve-
 ry heavy; and, for remedy of these several defects, enacting a security for the rightful
 possessors of land within the island.

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“ all the defects afore related, and quieting the possessions
 “ and settling the tenures of the inhabitants of this island,
 “ Be it enacted by his Excellency *Francis*, Lord *Willoughby*,
 “ of *Parham*, and his council, and gentlemen of the assembly,
 “ and by the authority of the same, That, notwithstanding
 “ the defects afore related, all the now rightful
 “ possessors of lands, tenements and hereditaments, within
 “ in this island, according to the laws and customs thereof,
 “ may at all times repair unto his Excellency for the full
 “ confirmation of their estates and tenures, and then and
 “ there shall and may receive such full confirmation and
 “ assurance, under his Majesty's great seal for this island,
 “ as they can reasonably advise or desire, according to the
 “ true intent and meaning of this act.

And annulling for the future the payment of the above poll-tax, and all other duties, rents, and arrears of rents, which were or might be levied; the inhabitants to hold to them and their heirs for ever in free socage, on a nominal rent to his Majesty, his heirs and successors, for all rents and services, in consideration as expressed.

“ And be it further enacted, by the authority aforesaid,
 “ That all and every the payments of forty pounds of
 “ cotton per head, and all other duties, rents, and arrears
 “ of rents, which have or might have been levied, be from
 “ henceforth absolutely and fully released and made void;
 “ and that the inhabitants of this island have and hold
 “ their several plantations to them and their heirs for ever,
 “ in free and common socage. Yielding and paying, therefore,
 “ at the feast of St. Michael every year, if the same
 “ shall be lawfully demanded, one ear of Indian corn, to his
 “ Majesty, his heirs and successors for ever, in full and free
 “ discharge of all rents and services for the future, in
 “ consideration of the release of the said forty pounds, and
 “ in consideration of the confirmation of all estates in this
 “ island, as aforesaid, and in acknowledgment of his Majesty's
 “ grace and favour in sending to and appointing over us his
 “ said Excellency, of whose prudence and moderate government we
 “ have heretofore have had large experience, and do rest most
 “ assured thereof for the future.

And to maintain the honour and dignity of his Majesty, for the public and private security, for repairing forts, and other purposes expressed, they give and grant to his Majesty, his heirs and successors, an impost or custom upon the native commodities of the said island of Barbadoes, viz. upon all dead commodities exported four and a half in specie for every five score.

“ And forasmuch as nothing conduceth more to the peace
 “ and prosperity of any place, and the protection of every
 “ single person therein, than that the public revenue thereof
 “ may be in some measure proportioned to the public
 “ charges and expences; and also well weighing the great
 “ charges that there must be of necessity in the maintain-

“ ing the honour and dignity of his Majesty’s authority
 “ here; the public meeting of the sessions; the often at-
 “ tendance of the council; the reparation of the forts; the
 “ building a sessions-house and a prison; and all other
 “ public charges incumbent on the government; do, in
 “ consideration thereof, give and grant unto his Majesty,
 “ his heirs and successors for ever, and do most humbly
 “ desire your Excellency to accept these our grants: And
 “ we humbly pray your Excellency that it may be enacted,
 “ and be it enacted by his Excellency *Francis*, Lord *Wil-*
 “ *loughby*, of *Parham*, captain general and chief governor
 “ of this island of Barbadoes, and all other the Carribbee
 “ islands, and by and with the consent of the council, and the
 “ gentlemen of the assembly, representatives of this island,
 “ and by authority of the same, That an impost or custom
 “ be, from and after publication hereof, raised upon the
 “ native commodities of this island, after the proportions
 “ and in manner and form as is hereafter set down and
 “ appointed. That is to say, upon all dead commodities
 “ of the growth or produce of this island, that shall be
 “ shipped off the same shall be paid to our Sovereign Lord
 “ the King, his heirs and successors for ever, four and an
 “ half in specie for every five score.”

And the jurors aforesaid, upon their oaths aforesaid, far-
 ther say, That by act of assembly of the island of St. Chris-
 topher, in the West Indies, passed in the said island, in the
 year of our Lord 1727, intituled, “ An act to subject all
 “ goods and commodities of the growth and produce of
 “ the late French part of the island of St. Christopher,
 “ which are or shall be shipped off from the said island,
 “ to the payment of the four and an half per cent. duty, and
 “ to ascertain at what places all the duties of four and an
 “ half per cent. shall be received.”

Act of as-
 sembly of
 St. Christo-
 pher, to
 subject the
 commodi-
 ties of the
 growth of
 the late
 French part
 of the island
 to the pay-
 ment of th

four and an half per cent. duty.

It is, amongst other things, recited and enacted as follows:
 “ Whereas in and by an act or statute of the general council
 “ and general assembly of the Leeward Carribbee islands, in
 “ America, called or known by the names of the island
 “ of Nevis, St. Christopher, Antigua, and Montserrat,

Reciting
 an act of
 the general
 council or
 assembly of
 the Lec-
 ward is-
 lands, Ne-

vis, St. Christopher, Antigua, and Montserrat, for settling an impost on the commodi-
 ties of the growth of the said Leeward islands, whereby a custom of 4 pounds and an
 half in specie for every hundred weight was granted by the said islands to Car. 2. for
 the exports of the commodities of all and every the said islands.

“ made in or about the year of our Lord 1663, and entitled, “ An act for settling an impost on the commodities of the growth of the said Leeward Carribbee islands,” a certain duty or custom of four pounds and an half in specie for every hundred weight of the commodities of the growth and produce of the said Leeward islands then afterwards to be shipped off from the said islands, or any of them, was given and granted to our late Sovereign Lord *Charles* the second, then King of England, Scotland, France, and Ireland, and to his heirs and successors for ever, as in and by the same act or statute, relation being thereunto had, may more fully and at large appear.”

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Reciting the treaty of peace at Utrecht, by which the late French part of that island was ceded to Great Britain.

And whereas since the making of the said statute, to wit, in and by the late treaty of peace and friendship concluded at Utrecht between the two crowns of Great Britain and France, an entire cession was made by the most Christian King *Lewis* the fourteenth to our late Sovereign Lady *Anne*, Queen of Great Britain, France, and Ireland, and to her crown for ever, of all that part of the island of St. Christopher formerly belonging to the crown of France; so that the same late French part of the said island of St. Christopher is now become parcel of the realm of Great Britain, and is under the sole dominion and government of the crown of the same.

And that doubts have arisen, whether the said part, late of the French, be subject to the payment of the aforesaid duties.

And whereas some doubts have arisen, whether the said late French part, so yielded up as aforesaid to the said crown of Great Britain, be subject to the payment of the aforesaid duties of four and an half per cent. so as aforesaid in and by the said recited act given and granted to our said late Sovereign Lord King *Charles* the second, his heirs and successors; “ for avorking, therefore, all disputes and controversies which may for the future arise within the same island, touching or concerning the payment of the same duties, we, your Majesty’s most dutiful and loyal subjects *John Hart*, Esq; your Majesty’s captain general, and governor in chief of all your Majesty’s Leeward Caribbee islands in America, and the council and assembly of the said island of St. Christopher, do humbly beseech your Majesty that it may be enacted and declared, and it is hereby enacted and declared, by the King’s most excellent Majesty, by and with the advice and consent of the captain general and governor in chief of the said Leeward Carribbee islands, in America, and the council “ and

“ and assembly of the said island of St. Christopher, and
 “ by the authority of the same, That all and singular the
 “ goods and commodities of the growth and produce of
 “ the said late French part of the said island of St. Chris-
 “ topher, and which at this time are, or hereafter shall be
 “ shipped off from thence, in order to be carried to any
 “ other port or place whatsoever, are and for ever after
 “ shall be subject and liable, and the same goods and com-
 “ modities, and every of them, are hereby made subject
 “ and liable to the payment of the aforesaid duties and
 “ customs of four pounds and half a pound per cent. in
 “ specie, to your most sacred Majesty, your heirs and suc-
 “ cessors, in such manner and sort as the goods and com-
 “ modities of the growth and produce of that part of the
 “ said island known and called by the name of the English
 “ part thereof, have heretofore and hitherto been subjected
 “ and liable unto by force and virtue of the above recited
 “ act or statute.”

And enact-
 ing and de-
 claring that
 the commo-
 dities ex-
 ported from
 the said
 part, late
 belonging
 to the
 French, are
 and shall be
 subject to
 the afore-
 said duty of
 four and an
 half per
 cent.

And the jurors aforesaid, upon their oaths aforesaid, farther say, That by an act of assembly of the island of Nevis in the West Indies, passed in the said island in the year of our Lord 1664, entitled, “ An act for settling an
 “ impost on the commodities of the growth of this island,” it is, amongst other things, recited and enacted as fol-
 lows:

Act of as-
 sembly of
 Nevis,
 1664.
 for settling
 an impost on
 the com-
 modities of
 the growth
 of the
 said island.

“ Whereas our late Sovereign Lord *Charles* the first, of [*672]
 “ blessed memory, did, by his letters patent under the
 “ great seal of England, grant and convey unto *James*,
 “ Earl of *Carlisle*, and his heirs for ever, the propriety of
 “ this island of Nevis; and his sacred Majesty that now
 “ is having by purchase invested himself in all the rights
 “ of the said Earl of *Carlisle*, and in all other rights
 “ which any other person may claim from that patent, or
 “ any other, and thereby more immediately hath * taken
 “ this island and the rest of the Carribbee islands into his
 “ royal protection: And his most excellent Majesty having
 “ by letters patent under the great seal of England, bear-
 “ ing date the twelfth day of June, in the fifteenth year
 “ of his reign, appointed his Excellency *Francis*, Lord
 “ *Willoughby*

* R. having.

“ *Willoughby*, of *Parkam*, captain general and chief gover-
 “ nor of Barbadoes, and the rest of the Carribbee islands
 “ with full power and authority to grant, confirm, and
 “ assure to the inhabitants of the same, and their heirs for
 “ ever, all lands, tenements, and hereditaments, under
 “ his Majesty’s seal appointed for Barbadoes, and the rest
 “ of the Carribbee islands, as, relation being thereunto
 “ had, may and doth more at large appear.

“ And whereas, by virtue of the said Earl of *Carlisle*’s
 “ patent, divers governors and agents have been sent over
 “ hither with authority to lay out, set, grant, or convey
 “ in parcels the land within this island, to such persons
 “ as they should think fit, which was by them, in their
 “ respective times, as much as in them lay, accordingly
 “ performed. And whereas many have lost their grants,
 “ warrants, or other evidences for their said lands; and
 “ others, by reason of the ignorance of those times, want
 “ sufficient and lawful words to create inheritances in them
 “ and their heirs; and others that never recorded their
 “ grants and warrants; and others that can make no proof
 “ of any grants or warrants they ever had for their lands,
 “ and yet have been long and quiet possessors of the same,
 “ and bestowed great charges thereon. And we do hum-
 “ bly pray your Excellency that it might be enacted, and
 “ be it enacted, by his Excellency *Francis*, Lord *Willoughby*,
 “ of *Parkam*, captain general and chief governor of the island
 “ of Barbadoes, and the rest of the Carribbee islands, and by
 “ and with the advice and consent of the council and
 “ gentlemen of the assembly, representatives of this island,
 “ and by the authority of the same, That an impost or
 “ custom be, from and after the publication hereof, rais-
 “ ed upon the native commodities of this island, after the
 [673] “ proportion and in manner and form as is hereafter set
 “ down and appointed: That is to say, upon all commo-
 “ dities of the growth or production of this island that
 “ shall be shipped off the same, shall be paid to our So-
 “ vereign Lord the King, his heirs and successors for ever,
 “ four and an half in specie for every [five] * score.”

Act of as-
 sembly of
 Antigua,
 19 May,
 1668.

And the jurors aforesaid, upon their oaths aforesaid,
 farther say, That by an act of assembly of the island
 of Antigua, in the West Indies, passed in the said island
 on the 19th day of May, in the year of our Lord 1668,
 entitled,

* Note, “ Five” is not in my copy of the verdict, but is supplied as
 omitted by mistake.

entitled, “ An act for the settlement of the custom or
 “ duty of four and a half per cent.” it is, amongst other
 “ things, recited and enacted as follows: “ Whereas by
 “ reason of the late unhappy war which arose betwixt his
 “ Royal Majesty *Charles* the second, King of Great Bri-
 “ tain, France and Ireland, &c. and the most Christian King,
 “ in France, as well as the States General of the United
 “ Netherlands, several of his Majesty of Great Britain his
 “ territories on this side the Tropic, became subject (through
 “ conquest) unto the said French King and his subjects;
 “ and, amongst others, this island of Antigua also was
 “ so subdued by Monsieur *de Labarr*, lieutenant general
 “ by sea and land to the said French King, being assisted
 “ by the Cannibal Indians; by means whereof all the lands
 “ within this island became forfeited unto his Majesty,
 “ &c. as by an act of this country, bearing date the tenth
 “ day of April last past (reference being thereunto had)
 “ may more at large appear. Know ye, that for and in
 “ consideration of new grants and confirmation of our said
 “ lands, under the great seal appointed for Barbadoes, and
 “ the rest of the Carribbee islands, by his Excellency Lord
 “ *Willoughby*, of *Parham*, &c. we do give and grant to his
 “ said Majesty, his heirs and successors for ever, and most
 “ humbly desire your Excellency to accept these our grants:
 “ And we do humbly pray your Excellency that it may be
 “ enacted, and be it enacted, by his Excellency Lord *Wil-*
 “ *loughby* of *Parham*, captain general and chief governor
 “ of Barbadoes, and the rest of the Carribbee islands, and
 “ by and with the advice and consent of the council, and
 “ gentlemen of the assembly, representatives of this island,
 “ and by the authority of the same, That an impost or
 “ custom be, from and after the publication hereof, raised
 “ upon the native commodities of this island, after the
 “ proportion and in manner and form as above set down,
 “ that is to say, upon all commodities of the growth or
 “ production of this island, that shall be shipped off the
 “ same, shall be paid to our Sovereign Lord the King,
 “ his heirs and successors for ever, four and an half in specie
 “ for every five score.”

Reciting
the con-
quest of An-
tigua by
Mr. La-
barr, lieu-
tenant ge-
neral of the
French
king.

Forfeiture
of lands in
the island to
the King of
Great Bri-
tain.

And in con-
sideration
of new
grants, giv-
ing and
granting an
impost of
four and an
half in spe-
cie for eve-
ry five
score as
above.

And the jurors aforesaid, upon their oaths aforesaid, far-
 ther say, That a custom-house was established in the said
 island of Grenada, and proper officers appointed thereto.

[674]
 Establish-
ment of a
custom-
house in
Grenada.

And

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The plaintiff, a natural born subject of Great Britain, 3d of the king of March, 1763, purchased a plantation in Grenada.

And the jurors aforesaid, upon their oaths aforesaid, farther say, That the plaintiff, being a natural born subject of the King of Great Britain, on the third day of March, 1763, purchased a certain plantation in the said island of Grenada, of the French inhabitants, in pursuance of the said articles of capitulation, and of the said treaty of peace, as many other British subjects had then and since have done.

And certain sugars of the plaintiff, of the growth of the said island, subsequent to the granting and registering of the letters patent of the 20th of July, 1764, were shipped off from thence; and the defendant, William Hall, being collector of the said duty, received

And the jurors aforesaid, upon their oaths aforesaid, farther say, That certain sugars of the plaintiff's and of the growth and produce of the said island of Grenada, and made from off the plaintiff's said plantation there, subsequent to the granting and registering of the said letters patent of the 20th of July, 1764, were exported from thence. And that the monies in the declaration mentioned to be had and received by the defendant to the plaintiff's use, were paid to and received by the said *William Hall*, in the said island of Grenada, as aforesaid, as and for the duty of four and an half per cent. imposed by the said letters patent of the 20th of July, 1764, he, the said *William Hall*, being then and there the collector of the said duty, for the use of his Majesty. And that the said *William Hall* hath not paid the same over to the use of his Majesty; but, on notice of this action intended to be brought, hath, by and with the consent of his Majesty's attorney-general, kept the same in his hands, for the purpose of trying the question arising upon the facts; and for which this action is brought.

the monies mentioned to be had and received to the plaintiff's use, as and for the said duty of four and an half per cent. imposed by the said letters patent, and hath not paid them over to his Majesty's use, but they remain in his hands, by the content of his Majesty's attorney-general, for the purpose of trying this question.

But whether the said impost was lawful or not, the jury are ignorant, and pray the advice of the court.

But whether upon the whole matter aforesaid, found by the said jurors, in manner aforesaid, the said impost or custom of four and one half per cent, in specie, for and upon all dead commodities of the growth or produce of the said island of Grenada shipped off for the same, was lawfully imposed or not, the said jurors are altogether ignorant, and pray the advice of the court in the premises.

And if, upon the whole matter, the

And if, upon the whole matter aforesaid found by the said jurors, in manner aforesaid, it shall appear to the court here court be of opinion that the said impost was not lawfully imposed, then the said jurors find for the plaintiff.

that

that the said impost or custom of four and an half per cent. in specie of and upon all dead commodities of the growth or produce of the said island of Grenada shipped off from the same, was not lawfully imposed, then the said jurors, upon their oaths say, that the said *William Hall* did undertake and promise, in manner and form as the said *Alexander Campbell*, by his said declaration, hath declared against him; and they assess the damages of the said *Alexander* on that occasion, besides his costs and charges laid out by him about his suit in this behalf, to 5l. and for such costs and charges 40s. [675]

Damages
5l.
Costs 40s.

But if, upon the whole matter found by the said jurors, it appear to the court here, that the said impost or custom of four and a half per cent. in specie of and upon all dead commodities of the growth or produce of the said island of Grenada, shipped off from the same, was lawfully imposed, then the said jurors, upon their oaths say, that the said *William Hall* did not promise and undertake in manner and form as in his plea alledged.

But if the court be of opinion the said impost was lawful, then they find for the defendant quod non assumpsit, in manner

and form as in his plea alledged.

This cause was first argued for the plaintiff by Mr. *Alleyne*, upon the above special verdict, in Easter term, 1774, in substance nearly to the effect following.

Mr. *Alleyne*—My Lords, if the wishes of government, or professional rank, could influence the decisions of this tribunal, I should now, considering the cause, and the dignity of those advocates who support it against me, adopt the example of the Roman orator, and begin with recommending my client to the grace and protection of his judges; but experience having taught me that here the genuine merits of a cause are the judicial guide, I gladly follow the practice of an English court, where the laws are heard by their own recommendation, and rise in humble confidence of counsel with the plaintiff, who, through me, solicits your Lordships justice in his behalf.

This long expected and truly interesting cause now comes before the court upon a special verdict, found at the trial of the general issue before your Lordship, on an action of *indebitatus assumpsit*; nominally, indeed, brought for the recovery of an inconsiderable sum of money; but substantially, to take the opinion of your Lordships upon a question of the first magnitude. The verdict, when relieved from the embarrassment

Action.

embarrassment of form, resolves itself into the following case.

Case.
Surrender
of Grenada
to the Bri-
tish arms
7th of Fe-
bruary.

The conquest of the island of Grenada, in the West Indies, was one among the many glorious achievements of the last war, and was surrendered to the troops of his Britannic Majesty, under general *Monckton*, on the seventh of February, 1762.

[676]
By the ar-
ticles of ca-
pitulation
the inhabi-
tants receiv-
ed as British
subjects.

The articles under which it capitulated acknowledge the inhabitants from thenceforth as British subjects; require them to take the oath of allegiance, as a reciprocal duty resulting from their adoption as such; secure to them the enjoyment of their religion; assure them of protection, in the same manner as the colonies receive it; with whom, by this surrender, and the consequent reception into the privileges of British subjects, they are placed upon an equal foot in the possession of the common liberty; and permit them to dispose of their own lands, provided it be to British subjects.

Absolute
cession by
the treaty
of Paris,
February
10, 1763.

On the general treaty of peace, signed at Paris, February the 10th, 1763, this island was ceded by his Christian Majesty, in full right, to the crown of England, under stipulations similar to those on which the province of Canada was ceded; and in general confirmatory of the articles of capitulation. And in this treaty his Majesty engages, in the most ample manner, for the free exercise of the Roman catholic religion; and gives his French subjects liberty to sell their goods and retire.

Proclama-
tion of the
7th of Oc-
tober, 1763.

On the seventh of October following his Majesty, to make good, in the fullest manner, those engagements, upon the faith of which the island had surrendered, and to perform at the same time the conditions of the treaty of peace, and farther, with a view to the better peopling and cultivating his said island, was pleased to issue his royal proclamation, inviting his British subjects to colonize in his new acquired dominions, and, as an encouragement, assuring them and the inhabitants in general already there, of the benefit of the English laws and constitution: And, for that purpose, declares to this effect; reciting that it will greatly contribute to the speedy settling of his said new governments, that his loving subjects should be informed of his paternal care for the security of those in their liberties and properties who were or should become inhabitants thereof; and farther, for the effectuating of such intent, "We
" have

“ have thought fit to publish and declare by this our pro-
 “ clamation, that we have, in our letters patent under our
 “ great seal of Great Britain, by which the said govern-
 “ ments are constituted, given express power and direction
 “ to our governors of our said colonies respectively, that
 “ so soon as the state and circumstances of the said colonies
 “ will admit, they shall, with the advice and consent of
 “ the members of our council, summon and call general
 “ assemblies within the said governments respectively, in
 “ such manner and form as in those colonies and provinces
 “ in America which are under our immediate govern-
 “ ment.”

Having thus declared his resolution to execute the en-
 gagement in their favour by this first step, as early as pos-
 sible, of calling assemblies as in the colonies and provinces
 in America, under his particular protection, and his incli- [677]
 nation and desire to manifest his paternal care of his sub-
 jects. He proceeds to shew the extent and justness of the
 accomplishment of his design, by a full and particular de-
 claration of the nature, powers and design of these assem-
 blies when called, by adding: And we have also given
 power to the said governors, with the consent of our said
 councils and representatives of the people so to be summon-
 ed as aforesaid, to make, constitute and appoint laws, sta-
 tutes and ordinances, for the public peace, welfare and good
 government of our said colonies, and of the people and in-
 habitants thereof, as near as may be agreeable to the laws
 of England. Here then they saw the full idea of their be-
 coming British subjects which they did at the surrender, by
 this clear and perfect image of the beauty, order and free-
 dom of the British constitution imparted to them, and to be
 the model and foundation of their own.

Powers of
 these assem-
 blies to
 make laws.

But as it might happen that this benefit, thus pledged and
 confirmed to them, could not be immediately communi-
 cated in its full extent; his majesty provides thus in the
 mean time, and until such assemblies can be called, all per-
 sons inhabiting or resorting to our said colonies may confide
 in our royal protection, for the enjoyment of the benefit of
 the laws of our realm of England: So that the enjoyment
 of these laws was to anticipate even the calling of the as-
 semblies, which was not to be a commencement of their
 freedom, nor of their exercise of the rights of British
 subjects, nor of their participation in the British constitution
 but one act, most important and illustrious indeed, of that
 freedom,

The calling
 of assem-
 blies not
 the incho-
 ation of
 their free-
 dom, nor
 of the con-
 stitution;
 but an act
 resulting
 from these
 already in-
 herent in
 them as
 British sub-
 jects.

freedom, those rights, and that constitution already in their possession.

For this purpose courts of judicature to be immediately erected, with powers conformable to those of the laws of England.

And it is material to consider what is the first step which the governor is to take upon his arrival in the island, for the purpose before expressed, of giving the inhabitants the benefit of the laws of England. It follows immediately, "We have given power under our great seal to our governors of our said colonies respectively, to erect and constitute with the advice of our said councils respectively, courts of judicature, and public justice within our said colonies, for the hearing and determining all causes, as well criminal as civil, according to law and equity; and as near as may be agreeable to the Laws of England."

Here then the laws of liberty and of England are enthroned in the island as soon as ever the delegate of the executive powers arrives there, and he is sent to give them effect amongst those who were already entitled to them as British subjects, and both in criminal and civil causes, both in strict law and liberal equity; in the whole, and in the great members and distinguishing distributions, both in the objects and the manner of applying them, the laws of our constitution, the laws of England are to prevail, and, as near as may be consistent with local circumstances, are to be enjoyed as the general privilege of British subjects, there as here.

[678]

Second proclamation of the 26th of March 1764, providing for the survey and cultivation of the island, and for the necessary support and defence of the island; previous to the introduction of the laws of England as to their actual exercise.

Conformably to these repeated acts, and in prosecution of the same intention, on the 26th of March 1764, a second proclamation was issued; having the same object the establishment of the colonies, and declaring the same views already wisely adopted, and firmly engaged as to the means of attaining and perpetuating that establishment; and reciting the great benefit which will arise to the commerce of the kingdom, and to his Majesty's subjects in general, from a speedy settlement of the new acquired islands, of which this of Grenada is named the first. It gives directions for the survey of the lands, the distribution into districts and parishes, analogous to the English divisions, the culture of the various produce of the country, the apportionment of the ground into due lots for that purpose; and in general recognizes the inhabitants as his Majesty's loving subjects, and provides such means as were judged expedient for their necessary support and defence, their internal order, plenty and happiness, previous to the completion of these by the enjoyment of the laws of England, which, as they had in right, they were to have speedily in possession.

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In further prosecution of this design on the 9th of April 1764, his Majesty was pleased to grant his royal letters patent to General Melville, constituting him Captain-General and Governor of the new islands, Grenada, the Grenadines, Dominica, St. Vincent, and Tobago.

Patent 9th, of April 1764, to Robert Melville, Esq. constituting him Governor.

This patent is set forth *verbatim* in the record. In substance it provides for the good government of the ceded islands, gives directions to take and administer the oaths of allegiance and supremacy; gives authority to the governor, and requires and commands him to summon an assembly, describes the manner of election by the freeholders, and thus called they are to sit as representatives; and together with the governor and council to be the legislature of the country, and to make laws as near as possible to the laws of England, with the usual provision that they shall be void if not allowed by his Majesty within a limited time; and hereby is finally established in Grenada a constitution, in principle and form, in the design of the whole, in the disposition of the parts, in their respective functions and joint operations, an exact epitome of the British form of government: Yet a constitution not given by the patent, but only to be put in full exercise.

Commanding him to call the legislative assembly of representatives.

With these powers his excellency arrived in Grenada, and instantly took upon himself the administration of the government; and in obedience to his commission called an assembly and opened the scene of legislation in the year 1765.

Arrival of the Governor the 14th of December 1764; assembly called 1765.

On the 20th of July 1764, posterior in point of date to these proclamations and this patent, his Majesty by his letters patent under the great seal, reciting an impost of four pounds and an half in specie for every hundred weight of the commodities of the growth of the island of Barbadoes, and of the Leeward Carribbee islands, paid and payable to his Majesty and his successors; reciting the session of the island of Grenada, and that it is reasonable and expedient that the like duties should take place there as in the other sugar islands, therefore in lieu of all customs and duties before paid by the inhabitants of the said island to the French, on goods exported and imported, imposes the above duty of four and an half *per cent.* and requires the governor and officers of the customs to raise, collect, and receive it to his Majesty's use.

[679] Patent posterior in the date to the two patents already mentioned, and to the proclamation; by which patent the duty of four and an half per cent. is imposed on every hundred weight exported required to

from the island; and the governor and officers of the customs authorized and collect it.

These

Registry
and pro-
mulgation
of the
above last
mentioned
letters pa-
tent Jan. 1765,

These letters patent were duly registered and publicly an-
nounced by his excellency the governor in Jan. 1765. A
custom-house was erected, officers appointed to act as col-
lectors of the customs, amongst whom the defendant was
one.

Many of
his Majes-
ty's subjects
in the mean
while resort
to Gren-
ada, under
the assur-
ances of the
royal pro-
clamation,
and pur-
chase lands
there, and
amongst
them the
plaintiff.

During these transactions several of his Majesty's subjects,
induced by the royal promises so frequently made, resorted
to Grenada and became purchasers of land therein. Amongst
the first of which was *Alexander Campbell*, Esq; the present
plaintiff; whose plantations succeeded, and he was about
to ship off his sugars from the island of Grenada to the
London market, when he was interrupted by the defendant
demanding this payment of the impost already stated: The
jury find he paid it, and that the same is the money on
which the action is brought: The verdict concludes in the
proper form, and leaves to the court whether on the whole
of the case the impost be legal.*

Payment of the impost by the plaintiff on demand: Conclusion of the verdict.

That at the
time when
this patent
of the 20th
of July
1764 is dat-
ed, such
impost was
incompe-
tent to the
crown and
illegal.

And my professional duty now leads me to contend, that
it was not competent to the crown on the 20th of July 1764,
the day on which the patent for raising this impost is dated,
to impose a permanent tax, as this, on the island of Gre-
nada—of course that the present sum in question was im-
properly exacted; the money erroneously paid, or at least
without any legal obligation to pay it; and the plaintiff
therefore entitled to your Lordship's judgment.

[680]

As this claim is founded upon a supposition of royal pre-
rogative, which ought to be treated with deference and re-
spect, it will be perhaps convenient (before I make an essay
which the importance of the point renders an anxious one
to me of discharging that duty) to define what prerogative
is, that I may be understood not to make any exceptions to
it in general; nor to argue against an high and beneficial
privilege

* Lord *Mansfield* here reminded Mr. *Alleyne*, that he had omitted that
part of the verdict which finds that the money is retained in the hands of
the defendant, by consent of the Attorney-General, in order to try the
right. I only mention this, because otherwise you could not have had your
action against a custom officer in this form

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privilege of the crown, and as I apprehend beneficial to the people in what I conceive to be its true and proper sense. The term is too often received with indignant jealousy by an English audience from mistaken notions of it, which were formerly entertained, and which have excited prejudices surviving, as is common, the particular causes which gave them rise. To anticipate any such misrepresentations, I beg leave to offer this definition of prerogative, in which, I trust, I shall have your Lordship's support: Prerogative is that portion of political power, which the constitution has intrusted with the crown for its own and the public honour and security." *

Prerogative.

There are a few facts in this case which are introductory to the direct point in argument, and those therefore will merit a particular notice and comment.

First, the effect of the proclamation of the 7th of October 1763. The substance of it is, a recital of the benefit naturally resulting to the British empire from a system of colonization in Grenada; and in order to invite the natural subjects of that country, on whom naturally would be the first dependence, and by whom there was the fairest prospect of answering this desirable end;—to invite them to settle there, it repeatedly assures them that a constitution as soon as possible shall be formed in exact conformity and representation of the English government; whereby all powers of state should be duly distributed, and lodged in hands competent to execute it to the freedom of the subject and the security of the infant colony, by a full participation of our wise and admirable constitution. Then follows the proclamation of the 26th of March 1764, putting the country in order, and preparing the face of it to rejoice as it were in the laws it was to receive; then follows the patent to Governor *Melville*, with an immediate execution of these engagements, in part, by directing him to constitute courts of judicature, for the administration of the whole internal policy of the country, as near as possible to the laws of England; and to call assemblies as soon after as was possible, in the very effigies of the English constitution, with the same powers, and to the same ends of public freedom, order and happiness, and of maintaining a similitude between the parent state and the colony.

On the effect of the proclamation of the 7th of October 1763.

Of that of the 26th of March 1764; and the patent of the 9th of April.

How

* Prærogativa est jus regis bonum et antiquum, in decus et tutamen regni, secundum bonas et antiquas populi libertates, et juris Anglicani leges et consuetudines.

[681]

Observations on their united tendency to support and illustrate, and enforce each other; that the rights of conquest were waived by the proclamation of 1763; the practicability of governing Grenada by the laws of England, recognized by the power to the governor of appointing courts of judicature, on the plan of that law, and the island from a conquest received as a colony.

The benefit of the laws of England excludes government by the law of conquest.

How wise, how politic the measure ! for the crown at that time conqueror of Grenada, the old inhabitants subjected to the laws of conquest it might naturally be presumed that British subjects would be jealous of such a power, and disinclined to settle where, under the circumstances, not only a change of place, but a change of political relation might ensue. To remove these suspicions if any yet remained—for his Majesty, both by the terms under which his General had received the surrender, and by the stipulations of the treaty of peace, had given assurances of better things to the old inhabitants themselves, with whom he had been at war; and had wisely, and as became the honour of a King of Great-Britain, disclaimed to govern in the spirit of conquest when he had sheathed the sword.—But to give the fullest satisfaction to the inhabitants in general, and to those particularly of his own subjects who should be inclined to settle, the proclamation declares that all the inhabitants there, or who should in future resort thither should have the full enjoyment of the laws of England. This construction arises from the true meaning of the words, if any words of our language admit a definite sense; it appears forwarded and enforced by the subsequent acts but now stated. And the necessary effect of this great and solemn instrument is a waiver of the rights of conquest whatever they were before. By the proclamation of 1763, in the most explicit terms a recognition is made, of the practicability of governing this island of Grenada by the laws of England, and a receiving of this sometime conquest as an English colony; and, until I hear the contrary, a short argument shall evince it.

A constitution is promised; but that might be a work of time to complete and execute in actual operation. In the mean time however, courts of judicature are erected; they shall administer, and the measure of this judicial conduct shall be the laws of England. Can this be compatible with any principle of conquest? Can the benefit of the laws of England be enjoyed, without laying aside the government of a conqueror ! Certainly no. The strong hand of power enforces the laws of arms; the peaceful voice of law, secures the enjoyment of the rights of British subjects.

The same observations will shew that the crown held it neither impracticable nor dangerous, to introduce the laws of England, and establish freedom in this conquered country.

From

From the whole I argue, that the inhabitants of Grenada were considered as a colony annexed to the crown of England, and not to be governed by the laws of conquest; but on a plan similar to that which issues from the common center, and pervades the whole system of our American settlements.

That the inhabitants of Grenada were considered as a colony being settled, in a country annexed to the crown of England, and on the system of the other American settlements.

annexed to the crown of England, and on the system of the other American settlements.

If this be granted, and I see not how it can be questioned, consistently with facts, I then conclude by direct and necessary inferences from premises which I think clear and uncontrovertible, that every constitutional right of the British subject necessarily belonged to them; they were entitled to call upon the crown to secure those rights, and were competent by every legal means to defend those rights.

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If so, that every constitutional right of British subjects necessarily was theirs, and they were

entitled to defend every such right by every legal means.

Of course the crown could assume no legislative power over them; could impose no permanent tax; for taxation at least requires an act of legislation. These observations, which would all result, and I should think irresistibly, from the single proclamation of the 7th of October of 1763, receive additional force from the second proclamation, and from the patent to Mr. *Melville* to shew the same opinion in the royal mind, the same purpose, the same idea, and repeat the same assurances to the subject; and if it were possible to make them clearer or more certain they would have this effect: However, at least they cannot weaken what was clear and certain before; they would strengthen it, if it had need of strength.

And that the crown had no legislative power over them, and of course no authority to impose a permanent tax.

From them we get to the exact point of argument, “whether the crown, on the 20th of July 1764, possessed a legislative authority over the island of Grenada.”

The great general question whether the crown

on the 20th of July 1764, possessed a legislative authority over the island of Grenada?

The technical learning of Westminster-Hall can give but little assistance in the investigation of this question. The great principles of the law of empire must determine it; to which the political history of England affords particular illustrations.

That the technical learning of Westminster-Hall will but little assist

the enquiry which must be determined on the great principles of the law of empire, illustrated by the history of England.

This course I shall pursue, and as I proceed glean up the learning to be found in the books; from which progress, I trust, I shall safely draw that conclusion, which forms the ground whereon my client now stands hoping success, and I trust, not hoping it in vain; since I hope to prove he has on his behalf the most powerful advocates, and most prevailing in this court, justice and right.

The principles of the law of empire in the social nature of man; and the reciprocal conformity of the individual to social regulations and of those to him.

The principles of the law of empire are founded in the social nature of man.—As natural law is derived from natural connections; so political law is derived from social connections. That considers him as a creature as he came from his mother's hand; this as a member of society paying obedience to the laws of his community, and reciprocally deriving protection from them.

the individual to social regulations and of those to him.

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Change of community induces a change for the time of these municipal obligations, and so on coming to a country newly acquired by arms though of his own estate. But in a newly discovered country or colony, the laws of the mother state as far

From hence arises one incontestable principle—so long as he pays due obedience to the law, so long he is entitled to its security; provided he continue in a place where the exercise of that law is practicable; if he quit his native soil and resort to a foreign state, the municipal constitutions of his country being not the measure of his civil conduct there, protection for a while is suspended, it intermits until his return.

If he resort to a country newly acquired by arms though by his own state there; if the necessity of the state requires that such country be governed by more rigorous means he must submit to them: But if he resort to a newly discovered country or colony, and settle under the auspices of the mother state, there the laws of his original country still afford their protection, as far as may be agreeable to the local circumstances of that country to which he has arrived; still measure his civil conduct: The executive magistrate shall frame a constitution for him to secure his birth-right, with every appendage of his ancient government.

as is compatible with the state of the colony will subsist, and the rights derived under them to the colonists.

Mr. Vattel
et Nent-
chattel. p.
1. c. 18. p.
91. Lond.
Ed. 1760.

This necessarily follows from the principle I first proposed; and it is hardly necessary to resort to an authority where reason is so clear: Yet, I am happy to refer to the illustrious name of *Vattel*, and fond of this occasion of mentioning it with deserved veneration, and I hope to be excused, if I

That a colony is become part of the state from whence it issued, and has the same laws and privileges,

indulge

indulge the pleasure of quoting him, with some vanity perhaps, when I find my notions graced by his authority. In Q. 10. *sec. B. 1.* Your Lordship will find him expressing himself in these words, “ when a nation takes possession of
“ a distant country and settles a colony there, that country,
“ though separated from the principal establishment or
“ mother country, naturally becomes a part of the state,
“ equally with its ancient possessions. Whenever there-
“ fore the political laws, or treaties, make no distinction
“ between them, every thing said of the territory of a na-
“ tion ought also to extend to its colonies.”

If therefore the political laws are coextensive with the territory of the state, however 'disjoined in space, as this excellent author decides they are, then every constitutional right of the subject of that state is co-extensive; the fundamental laws of the state equally so, and personal liberty and private property alike universally protected.

Inference that then the constitutional rights extend over the whole territories of a state,

and personal liberty and property alike protected.

This generally follows from his general position: But though I illustrate my argument by this quotation, I do not shelter myself under any foreign authority; nor merely under authority of whatever * growth: I appeal to the light of reason, that a change of place can never merely as such operate a forfeiture of original social rights. True, as I have before said, it may sometimes suspend the enjoyment of these rights under peculiar circumstances of policy; or make some of the laws of the parent state inapplicable from difference of situation: But the mere act of colonization never can suspend whilst the operation of the law continues practicable; far less can it annihilate these rights.

That reason affirms, a change of place can never of itself extinguish these rights; it may suspend in some instances, but not in that of colonization.

Let us now, to close this part of the argument, hear the legal authorities of our own country. We shall find the general learning of Westminster-Hall coincide with this theory.

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In *Blankard and Galdy*, 2 *Salk.* 411. Lord *Holt*, Chief Justice says the reporter and the whole court with him held thus:

Cases in support of this proposition, *Blankard and Galdy*, 2 *Salk.* T. 5 *W. & M.*

1st. In case of an uninhabited country newly found out by English subjects; all laws in force in England are in force there.

That the laws of England take place in a colony ipso facto; in a conquered country, when declared by the conqueror.

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2d. Jamaica being conquered, and not pleaded to be parcel of the kingdom of England; the laws of England did not take place there, until declared so by the conqueror or his successors.

The first point expressly maintains the propositions of *Pattell*, and his Majesty has put Grenada in express terms upon the same footing with "the other colonies;" therefore all the laws of England (so far as is agreeable to that island) are in force there.

But farther as a conquered country, the conqueror has declared that the inhabitants of Grenada shall enjoy the laws and constitution of England, which brings it within the second point.

2 Peere
Williams
75. anno
1722.

Agreeable to this is what is reported by the master of the rolls in 2 *H. W.* 75. of a determination before the King in council, upon an appeal from the foreign plantations, that if there be a new and uninhabited country found out by English subjects, as the law is the birth-right of every subject, so wherever they go they carry their laws with them; and therefore such new formed country is to be governed by the laws of England, then in being when they first settled.

As to the second point it goes to be sure on too large a ground, in supposing conquest gives a property to the conqueror in the people conquered.

[685] This principle is taken up by Mr. Justice *Blackstone* in his commentaries, who allows the doctrine, and the exceptions to it which he makes in general such as result from the inconvenience which would fall on the colony, from a general adoption from the laws of the parent state.

Every day's experience before the council warrants this principle: The laws of descent and of all property are current in Ireland, and in every plantation; in every part of the empire. By what law? By none positive there; but as a necessary consequence of the country being a part of the British empire.

Mr. Campbell, at and before the date of the patent constituting impost, was a British subject.

The laws of Great Britain found practicable and expedient and introduced by the executive magistrate.

magistrate

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magistrate of the state, competent to decide on the propriety of introducing the laws of England into Grenada, has declared such propriety; has introduced them. Then by necessary consequence, they were entitled to them; they wanted no other act to give it to them; and Mr. *Melville* was only to hasten in the performance of this duty to put their constitution in act, and secure their rights.

By what mode of reasoning then am I to learn that his Majesty had at this time a legislative authority over the island of Grenada? To make temporary regulations on a sudden until all was finished, was the extent of his prerogative; to impose a permanent tax was, as I submit, illegal.

That after this, until the settlement of the constitution, his Majesty

could interpose at most temporary regulations, not a permanent tax.

This argument, founded on the evidence of facts, anticipates, I think, every objection that the patent to Mr. *Melville* was executory. It is against the words, against the spirit, against the great end of the proclamations to suppose it was. The court will not give such a narrow and forced construction to a public grant, * founded on the most liberal and wisest principles, of policy, and upon which numbers of British subjects have fixed their settlement, in confidence of all the rights of freedom in a country so remote; a construction ill adapted to its terms, to its plain scope, and to the manifest reason of the thing if it had been a grant not to a nation at large, not to British subjects, to Englishmen, invited to settle for the encrease of commerce, but to a single private individual under any circumstances. Will the court intend that it was the design of the crown that British subjects, Englishmen, should be called to cross the Atlantic by the royal voice itself under such assurances, and when they arrive find their hopes dependant on a future discretionary possible grant? It is sufficient for me to say, by the patent, and by the proclamation of the 26th of October, nay, by the very terms of surrender and the general treaty of peace, the inhabitants are recognized as British subjects; The laws of England are recognized as practicable and beneficial to the island, those who were there and those who should afterwards resort there are promised the enjoyment of them. From that admission, this mutual contract, and these acts of the crown, I draw my argument, and thence derive the rights of the colony to the full benefit of the English laws and constitution.

Argued, that the engagement is not executory.

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And

* It seems that in public grants, the rule of the civil law holds, which says—*Beneficium imperatoris quam plenissime interpretari debemus*, though our law adopts the contrary in private grants.

Argu-
ments from
history.

And now, my Lords, from the consideration of the case in the general view of political theory, and from such authority as eminent writers and the decisions of our courts of our law furnish more directly to the point, I proceed to the review of the history of this country; and I trust, that the account I shall give your Lordship of our several acquisitions by conquest or colonization (in which latter conquest with us as with ancient Rome hath always terminated) will abundantly prove the antiquity and uniformity of my general argument.

I have spared no pains to inform myself of the history of these transactions; and, after a diligent research through the writings of Dr. *Leland* in his history of Ireland; of Sir *John Davies* in his discoveries, and the case of *Tanistry* in his reports; of Dr. *Harris* in his *Hibernia*; and of Mr. *Molyneux* in his contest with Mr. *Carey*; and lastly of the noble historian of the age of *H. 2.* I trust I am warranted in the principal facts and conclusions I have to offer concerning the history of the acquisition of Ireland.

I shall not refer to the books by pages, except that in Sir *John Davies's* reports, I would wish particularly to submit to your Lordship's notice the 37th page B.

Anno
1154.

Ireland, when *Henry 2.* first ascended the throne * of this kingdom, was divided into many small states, and was subject to all those evils and convulsions which distract savage unpolicied and divided countries.

Dermot King of Leinster, being driven from the throne by his rebellious subjects, solicited the assistance of *H. 2.* who, covering his ambition under the supposed sanction of the papal authority,* and taking the conquest of Ireland to be a desirable object, readily permitted certain of his subjects, with Earl *Strongbow* at their head, to land in Ireland, and to engage in the enterprize on behalf of *Dermot*.*

Anno
1171.

The stipulations were—in case of victory *Dermot* was to be restored; and in return a grant of lands was to be made to the English subjects.

[687] The event was prosperous; the terms on the part of *Dermot* were fulfilled.

King

* From Pope *Adrian* the 4th, whose name before his accession to the see was *Nicholas Breakfear*, and he himself was an *Englishman*. The letter authorizing *H. 2.* to conquer *Ireland*, and bring it to the obedience of *St. Peter*, is a very curious one; it is dated 1154, and may be seen in Lord *Lytton's* history.

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King *Henry* went over, and extending the conquest became possessed of a great part of the south-east of Ireland. Anno 1172.

The natives whom he subdued he ruled with the rod of empire, communicating as he thought fit certain privileges, and withholding others; and making as he judged necessary certain regulations: But those of his subjects whom he found settled there he recognized as such; of these he demands the performance of the feudal services; and, as a necessary consequence of their being subject to the obligations of those laws of England which were in force at their becoming a colony, the laws of England diffused their protection over the colonists: And he proceeds to secure the benefits of those laws by perfecting their constitution, and forming their government with every appendage of English policy. We see him dividing the country into counties, establishing sheriffs, erecting courts of judicature, corporations and general assemblies.

This account surely furnishes an ancient and illustrious instance to my general argument.

“ The laws of England are communicated at pleasure to the conquered natives; but result to the English colonists as a necessary consequent;” This point is elaborately discussed by Dr. *Leland*, decided by Sir *John Davies* in page 37; and adopted in the manner I state it by Lord *Hale*, who remarks the colonies of the Romans planted in conquered countries observed the Roman law; and takes it as of course, not assigning any reason for it or explaining the manner; the reason being indeed the necessary nature of the thing. But he gives large explanations how conquered countries may have their laws changed.

I own the great authority of Lord *Hale* does not seem to agree with me on the whole in this account of the establishment of the English law in Ireland, in the book just quoted; And I am aware too that this account is materially different from what Lord *Coke* lays down in his first Institutes 141. b. and in *Calvin's case* 7 Rep.* as if they were established by King *John*, and his son *Henry* 3. and farther were not the effect of colonization.

This striking difference engaged me to trace the subject minutely; and as the learned writers whom I have followed had access to the archives of the city of Dublin, and spent much time in every means of information, I choose to follow them as my leaders, in a point of history which they had made the subject of their particular attention, rather than the great oracle of the law.

The conquered part of Ireland governed with severity, as by a conqueror. The laws and constitution of England imparted to the colonists.

The laws of England result necessarily to the colonists of England. V. history of C. L. c. 5. p. 79.

*From page 1 to 28. Tr. 6 Jac. 1.

Answer to the reasons to the contrary.

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The subsequent history is as follows—and will, by stating, shew how Lord *Coke* fell into his mistake; for such with deference I call it; and such the facts I think prove it to have been.

That King John enforced, not originally gave the laws of England to the Irish.

* Statut et præcept.

The laws of *H. 2.* being too much neglected from the intercourse between the English colony and the native Irish, the latter obstinately fond of that lewd custom, as it is called, the Brehan law, of which there is much said in the case of *Tanistry* already cited; and this law getting ground in the English establishment, it was found necessary in the reign of King *John* to issue a proclamation, commanding the due observance of the laws of England to his English subjects; and King *John* himself went over to Ireland to enforce obedience to them. And King *H. 3.* his son speaking of his father as having “ordained and commanded,”* as Lord *Coke* takes it, but I think more consistently with history “settled and required the observance” of the laws of England, which had been established. The letter cited by Lord *Coke*, from whence too this is quoted, says King *John* reduced them into writing, and at the instance of the Irish. It is very natural to admit this, without supposing either that King *John* was the original founder of those laws in Ireland, or that they were not first there in consequence of colonization. There was very little statute law at that time; and it might be thought advisable by the administration here at that time to digest the common law of England into writing, the better to avoid confounding it with the Brehon law; and probably at the request not only of the English colonists, but of the wiser and more moderate part of the Irish who had perceived its excellence. But however fond King *John* or his son might be, to suppose that King *John* himself was the founder of these laws, (though I think it does not appear that either have asserted so much) there is no ground from facts to deny this honour to King *Henry* the second; but, I think, abundant to the contrary; And at the same time I think there is the strongest evidence from facts and reason, not without support from the express declaration of great authorities, to prove that they were originally introduced not by conquest, but as rights attendant on British subjects settling there as a colony.

What is stated to have been done by King *John*, and is taken by Lord *Coke* as the indulgent act of that King, communicating the laws of England to the Irish, I take it was no more than a proclamation enforcing obedience to the laws already

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already established: A prerogative the crown may exercise this day at London.

Indeed the settlement which he restored was farther improved under King *John's* reign, and enlarged in point of territory.

The same policy prevailed in the subsequent reigns, and we find King *Edward* the first summoning members to the British parliament in the third year of his reign, for the purpose of taxing the colony. We find writs returnable into this court, the *aula regis*, and in every instance similar protection and laws to the English and Irish subjects.

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King E. 1.
summoning
members
from Ire-
land to the
British par-
liament for

the purpose of taxing his Irish subjects anno 1275? Writs returnable in B.R. in Eng-
land: similar laws for the English and Irish subjects.

No instance more similar to the present case of Grenada can be conceived: And, surely, the politics of a crown infinitely more ardent to extend its prerogative than the present times will allow shall not surpass, in affording protection to the subjects, the laws of this day.

Application
to the case
of Grenada,
a multo for-
tiori, from
the notion
of preroga-
tive in those days.

The next instance we find in our political history is that of Wales: From it I shall derive strong argument in support of my general proposition: And in this I am yet farther satisfied that I proceed upon solid ground, as I find the result of my enquiries to quadrate with the opinion of the court, delivered in the case of the King and *Craze*.

T. 32 & 33
G. 2. 4 Bur.
834—64.

King *Edward* the first laid claim to Wales, as his feudal principality. The prince refusing to acknowledge him he treated him as his rebellious vassal, reduced the country by arms, caused the prince to be punished as a traitor, and took upon himself the immediate sovereignty.

E. 1. claim-
ed Wales as
a feudal
principality
anno 1283,
in the 9th

year of his reign.

He subjects them by arms; but, whatever was the real right, having subdued them, he recognizes them as his subjects (he could not, indeed, do otherwise upon the principle which he professed, of reclaiming Wales as a feudatory state, and declaring it, as he does in the twelfth year of his reign, to have been before subject to him of feudal right;) he communicates to them the laws of England, and takes every measure to secure to them the benefit of the enjoyment of those laws.

The

And was a part of the same feudal dominion with England. V. Hale's Hist. of C. L. c. 7. p. 162.

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So of Scotland, v. acta regia, from 83 to 91. This claim was made 10 May, anno 1191. V. also Hale's Hist. of the C. L. c. 10. * E. 3. 8th of May, 1360, by which were ceded the provinces of Poitou, Saintoigne, Agenois, Perigord, Limosin, Quercy, the Pais of Bigorre, Gaure, Angoulesme, and the territory of Rouergne. Montreuil, Ponthieu, Calais, and all the islands adjacent to the countries named. Vide acta regia, 170.

The history itself of those times (many valuable collections of which are to be found in *Rymer's Fœdera*) proves his conduct towards Wales not to have been as in right of a conqueror indulgently benefitting his subjects, but as the act of the feudal sovereign, and at the same time supreme executive magistrate of this country, securing to his subjects that protection which was their due, in return for their feudal homage and services, and securing it by a communication of the laws and constitution of England, considering Wales as under the general comprehension of the British empire.

Pursuing his magnanimous design, of uniting all the adjacent countries to the realm of England, he next turned his thoughts to Scotland: And the history of the town of Berwick, so fully developed by your Lordship in the case already cited, warrants the like observation as on Wales. He claimed Scotland expressly as sovereign lord of the fief, and governed it as a part of the great general fief, the British empire.

The reign of *Edward* the third next furnishes matter of a similar nature; and the ever memorable treaty of *Bretigny* * gave that prince an opportunity of extending his empire upon principles which had animated and directed his forerunners.

I have not been less assiduous in examining the springs of his government over those countries which were thus ceded to him.

I have pursued this enquiry chiefly through *Rymer's Fœdera*, in which are preserved all the state papers from the treaty of *Bretigny*, respecting the conduct of King *Edward* towards his dominions acquired from the King of France; and from them it appears most strikingly how uniform he was in following those principles of government which had been pursued by his predecessors *Henry* the second and *Edward* the first.

Permit me, however, in this place, to mention the sources from whence I extract the history I am about to give. Besides *Rymer*, *D' Ewes journals*; *notitia parliamentaria*, C. 4 *1st*. title *Calais*, the year book, 20 *H. 6.* 1 *R. 3.* and *Rot. Parl.* 50 *E. 3.*

As a preliminary observation, I would beg of your Lordship to remember, that by much the greater part of the country, thus ceded to King *Edward*, was claimed by him under a very different title from that of an appendage to the crown of England.

So

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So much as he claimed as in foreign right, this he erected into a principality, and conferred it upon his illustrious son *Edward* the Black Prince, by the title of Prince of Aquitaine. To this, which was much the greater part, he communicated a constitution totally different in form and principle from the English government, allowing unbounded powers of sovereignty to his son, and such as the English nation could not have borne: But as these countries were claimed by the King, as Duke of Normandy, heir to the house of *Anjou*, and to the house of France, through his mother, * this nation did not concern itself what powers it assumed, with regard to countries which he did not hold or claim to hold as part of the realm of England; as the feudal sovereign of those he acted agreeably to their laws, and to the powers which they allowed their prince; the subjects of this country had no right to interfere.

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But with regard to Calais the case was different: Calais he had conquered as King of England; and, having turned the former inhabitants out of their possession, he invites his own subjects of England to colonize therein.

Herein we find every principle of law adopted; the inhabitants participating in every security the English constitution affords: Writs of error returnable into this court; members representing the people of Calais in the English parliament.

How striking is this distinction! Over countries obtained by conquest, and claimed by a different title from that of England, he exercises an authority according to the title he claimed, very different from the authority of a King of England: Over the countries acquired to the crown of England, and inhabited by English subjects, he claims to himself no other power, than the lawful prerogative of a King of England.

This lively distinction, first adopted by *H. 2.* and continued by *H. 3.* at this time prevails between any American plantation and the electorate of Hanover. To the former all prerogative writs will run, as to the counties palatine of Chester and Durham; over the latter what power has your Lordship, the great seal, or the parliament?

The same distinction between Hanover and the colonies.

The history of this country, then, as to the political government of the lands ceded by the treaty of Bretigny,

Recapitulation of the evidence joined from these historical facts.

* Who was sister to *Charles le Beau*, and upon *Edward's* construction of the Salique law, as excluding females, but not the descendants of females, he was entitled by descent through his mother *Isabel* to the crown of France.

joined with the last observation respecting Hanover, furnishes additional proof to those of Ireland, Wales, and Scotland, already mentioned, and increases the weight of evidence from the experience of the nation corroborating this argument in a series of ages,

Hitherto, my Lord, I have endeavoured to penetrate pretty far into the ancient history of England, to which the nature of the question directed me, as it depends on the law of empire, evidenced by historical facts; and as no evidence of this occurred to me so proper and unexceptionable on this occasion as the history of our nation, in which I purpose to advance a step farther yet: And here a modern edifice presents itself to view, much worthy of observation, not only for the beauty and order of its structure, and the analogy of its frame to the majestic fabric of our own ancient constitution, but particularly upon this occasion; because in all these respects an examination of it will contribute much, if I am not deceived, to a clear discernment of the merits of the present cause: The object to which I am alluding is the American colonies.

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The American colonies.

That they are built upon the foundation of our English constitution, and of the rights of it, inherent in British subjects, anterior to grant or charter.

The crown, by its executive power, may execute any plan for the introduction or establishment or maintenance of the laws of the constitution in any part of the empire, and it is a branch of its trust.

America has been called, in a sense totally different from what is meant by the same words when applied to England, the dominion of the crown. The Americans have been considered as a different political species from the English; and have been called creatures of the King. Their rights have been said to have been derived from their charters; and it is probable the misapprehension of this particular has produced this very cause. Since it is the first in which the principles of colony law have been investigated, it is my duty to state those principles very minutely, and endeavour to rescue them from misrepresentation and mistake.

To do this I must beg leave to draw your Lordship's attention to one great leading constitutional principle. *The crown by its prerogative may execute any plan whereby the laws of the country may be promulgated or enforced, communicated or secured to the subjects of the empire.*

And the crown not only may, but it is a branch of the executive trust.

Thence proclamations, bodies corporate, markets of justice, counties palatine.

Founded on this principle, the right of issuing proclamations, incorporating bodies politic, for the purposes of municipal

pal jurisdiction, erecting tribunals, and constituting counties palatine, may strike your Lordships, and certainly this principle, the American constitutions have been

There is not a single clause in any charter which can im-
on this idea; but every part of them holds out the most
clusive evidence of their being legal acts of prerogative,
the purpose of securing constitutional rights to our fel-
subjects in distant parts of the empire.

The charters do not define rights, nor establish laws, nor
any other directions than merely for the formal esta-
blishment of an internal legislature and government.

Why, then, shall it be argued that the rights of the
colonies are emanations of the royal bounty? Not a single
constitutional right is granted by charter; and yet every
constitutional right is admitted to be the birth-right of the
Americans. The idea of the contrary is too frivolous to be
used in this place; and perhaps my contending against it
is therefore unnecessary.

In general I conclude, and propose it as a great consti-
tutional truth, that the American charters and patents are
granted to protect the antierior rights of the colo-
nies, and not to convey those rights, as dependent on those
arters, and derivative from them.

The colonies in America, it is well known, fall under
threefold description; first proprietary grants, as Pennsyl-
vania and Maryland; second, charter governments, as the
Massachusetts Bay; third, provincial establishments, as Cal-
ifornia and most others. In original principle the govern-
ment is in all the same, though somewhat different in ex-
ternal form.

The first sort may be assimilated to counties palatine, the
second to municipal corporations, the third sort are a species
themselves, as to their external constitution; all, how-
ever, flow from the principle I stated; all tend to secure
the subject the enjoyment of the laws of England; all,
the very nature of their establishments, shew that the
rights of the colonies are inherent and innate, not deriva-
tive or communicated by charter.

But here I expect I shall be told that the clearest argu-
ment possible will rebut me. The objection, if it shall be
made, has the sound of something material, and therefore,
rather than be thought either to overlook it, or to have
passed it more than I can persuade myself I ought, I will
offer to meet it.

That the
charters
support this
idea, nei-
ther defin-
ing rights
nor estab-
lishing laws,
nor giving
directions,
other than
for the for-
mal esta-
blishment
of the origi-
nal laws of
the parent
state.

[693]
General de-
duction.

The three
species of
colony go-
vernments.

Proprietary
grants assi-
milated to
counties pa-
latine, se-
cond to mu-
nicipal cor-
porations.

Appeal to
the King in
council.

It is certain that in the early charters granted to America the King reserves to himself an appeal to him in council, in the last resort; and from hence the ultimate judicature has been usually understood to be in the King personally, and not as in right of the crown of England, nor through his courts, as the British subjects, as to British subjects. From this circumstance, I suppose, it will be contended that the King is Sovereign of America, not as King of England, but personally; and the colonies are not governed by laws like Ireland, Wales, or Berwick, derived to the inhabitants in consequence of their being subjects of the British empire; but are like to Jersey and Guernsey, which belong to the King, and not to the Crown. Hence the argument would be, that all the colonies of America are dependent on the King, not as head of the general constitution, but in a very different relation, and my general principle would be much affected.

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To obviate all this, I need only desire it to be remembered that such a circumstance cannot alter constitutional law, or the principles of the law of empire; not even if it stood clear and unimpeached by that which I conceive will most completely reprobate it, the extreme art with which it was introduced into the charters, and the prevailing policy of the times when it was first conceived; I mean the policy of King *James* the first.

It is not in
the first
charter.

That it pro-
ceeded from
the particu-
lar notion
of King
James.

The first charter was granted to the Virginian adventurers, in which this reservation does not appear. In all the other charters it certainly does; and this is owing, I apprehend, to the extreme anxiety of *James*, whose favourite idea it was, from the first moment in which he ascended the throne, to consider every part of the British empire, not immediately within the actual limits of England in respect of local situation, as holden of himself, and not as component members of one great empire, at the head of which he stood as sovereign, in right of the crown of England, therein directly inverting the principles and practice of *H. 2. Ed. 1. Ed. 3.* and other princes, his predecessors.

To prove this there are many remarkable passages in the history of those times. The first is mentioned by Lord *Vaughan*, as being communicated to him by the great Mr. *Selden*.

King *James* asked Mr. *Selden*, whether Ireland (at that time, as your Lordships know, the subject of much political speculation) might not be considered as belonging to him

him personally, as the heir of the conqueror thereof; that the lands therein might be taken to be his own, and the Irish themselves as subjugated to the laws of conquest, and of course not entitled to the rights of Englishmen, nor to be considered as members of the same community, but dependent on his will, and beholden to his indulgence?

Mr. *Selden's* opinion will be mentioned by and by: It is not reported in *Vaughan*, but that learned judge himself there decides against the King; "That it cannot be reasonable to make the superiority only of the king and not of the crown of England." In the case of process into Wales my Lord *Vaughan* uses this expression; and adds, the practice has always accordingly, as, says he, is familiarly known by reversal or affirmance of judgments given in the King's Bench in Ireland in the King's Bench here; which, he continues, is enough to prove the law to be so in other subordinate dominions.

And in the case of *Craw* and *Ramsay*, it is decided that Ireland and the Plantations are holden of the crown as the sovereign of the British empire; and the like distinction which I took before between Anjou and Calais is made by the Lord Chief Justice. The same case is reported in *Ventris*.

But to return to King *James*: Another remarkable anecdote of his notions of government, to the same point, is to be found in the * journals of the house of commons. It occurs in many places, but particularly in the journal of the 25th of April 1621.

A bill was brought into parliament for the liberty of a free fishery on the banks of America, at that time in general called Newfoundland.

Government seemed extremely unwilling to suffer parliament to meddle. Says Mr. Secretary—I take it from the journals—"What have we to do with America? They are plantations; they belong to the King." But good old Sir *Edward Coke*, Mr. *Selden*, Mr. *Brooke*, and other great men, reply indignantly, What! when the King grants letters patent to them under the great seal are they not part of the empire, and shall not we interfere?

These observations shew the prevailing policy of those times. And are we, then to wonder that the right of ultimate judicature should be claimed by the King, and that he should artfully introduce into charters a reservation of it. A reservation indeed superfluous if there had been such a right

L. Vaughan's opinion to the contrary of King *James's*. *Vaughan's* Rep. p. 402.

Craw and *Ramsay*, H. 21 & 22 Car. 2. C. B. *Vaughan*, 278. V. p. 401. 2 Vent. 1 c. Journal of H. of C. 25 Apr. 1621. [*695]

Instance where the parliament would not suffer the private grant of the King to exclude the other subjects of Great Britain from a common share in the Newfoundland fishery.

right in the King personally; and of no effect if there was no such right; for then the reservation could not create it, contrary to the principles of the constitution.* We see what Mr. *Selden*, what the parliament of that time thought of it; what Lord *Vaughan* afterwards; what the practice of some of the greatest antecedent Kings; what the doctrine of the books; what the experience of nations; what the testimony of ages; what reason itself speaks: all concurring that all the parts of the British empire are under one constitution, and have all the rights and immunities which result from that constitution. The intrigues, therefore, of King *James* must not weigh against natural reason, political theory, legal authority, and the principles of the constitution §. The gentlemen who first went to the American settlements, in ages when the principles of political theory were scarcely known to the most refined, might not foresee the tendency, and therefore unwittingly submit to this claim of King *James*. But on any consideration, knowingly or unknowingly, they could make no concession to the prejudice not only of their constitution, but with it of ours.

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If ever that question of the relevancy of a writ of error from any settlement of the western world, shall come into litigation in this court, and it fall to my part to argue it, I hope I shall then know my duty, and what to say upon it. I hope I shall prove that the jurisdiction of the King in council, as the ultimate judicature, is unconstitutional and void; but if the experience of a century and an half shall be then held to outweigh arguments founded in principle, your Lordships will say, “The experience supports though the principle denies it,” and will take care that neither then nor now it shall be carried farther, and argue from a peculiar judicial authority, upon whatever ground, supported however by precedent if supported, to a legislative authority supported by no precedents; and, I beg leave to submit, not warranted by the principles of the constitution. To meet, however, the conclusion which might be attempted to be drawn from this claim of ultimate judicature in council, I have been drawn insensibly into this length of discussion.—The occasion must be my apology.

General recapitulation and conclusion.

I return now to conclude with the immediate point before the court. And in this, on whatever ground I consider

* Reservatio ut et protestatio non facit jus sed tuerur.

§ Nemini licet quod non per leges licet.

der this cause, whether in the general view of reason and experience, the opinion of eminent writers of foreign nations; the learning of our books; the principles of the law of empire; the history and experience of this country for ages; whether as to this particular island of Grenada, on the terms of the surrender, the treaty of peace, or more especially the proclamations and patents; whether on the great principles of our constitution, or the principles of natural justice and equity; on all, on any, on every ground I draw this conclusion, that on the 20th of July, 1764, his Majesty was in no wise entitled, by the prerogative of the crown of England, to impose the duty of four and an half *per cent.* in manner and form as is laid in the declaration, admitted by the defendant's plea, and found by the verdict: Such being an act of legislation, and repugnant to the principles of that government to which the inhabitants of that island were at that time entitled, and which belonged particularly to Mr. *Campbell*, the plaintiff, a natural born subject of the crown of Great Britain, found so and declared by the verdict, and were his by every right, secured to him by every sanction.

And while I have thus contended, and I hope established my client's interest, I further trust that this general review of our constitution, and of the history of our country, crowned by the decision of this court, will warrant me in saying of Britain what the Roman orator boasts of Rome: *Aliæ nationes servitutem pati possunt; populi Romani propria libertas.**

* Ciceronis
Philipp. 6ta.

Mr. *Wallace*, for the defendant—The question upon the special verdict is, whether the impost or custom of four and an half upon the exports of the island, in the manner found by the verdict, was, under the circumstances in which that island then stood, at the time of the impost, duly and legally imposed by the crown, or not?

Mr. *Alleyne* not having gone into the dispute of the authority and prerogative of the crown at any time to make proclamations, but examining the nature of this, and con- tending that, whatever might be the state of the island before that period, it was incompetent to the King from that time to give any laws whatever to the island of *Grenada*, (for if any, there is no doubt of taxation) this has relieved me from laying before your Lordships the rights of a King of this country over a conquered country.

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That the ground of the proclamation having waived any antecedent rights, makes it conquest:

not so necessary to consider the rights of

But otherwise that conquest carries with it a legislative authority.

What those rights are is a principle not only of the law of nations, but has been recognized wherever it came under consideration, even by the judges of this country; by acts of state, and historians; and, in one great instance, declared by all the judges. In *Calvin's* case it is recognized that the rights of conquest do belong to the King: And the rights of conquest are in that case extended farther than I wish they should be understood; but thus much, I take it, they necessarily give, a legislative authority. It is not now as formerly, that the conquerors gain captives and slaves, and absolute dominion, but now the conqueror obtains a just dominion, under due restrictions, and instead of slaves he acquires subjects. Not a propriety, as in goods, but an authority, as over men, reasonable and still free.

The effect of the letters patent is not to alter the condition of the island: It is only to raise certain duties raised there by the French King, and paid to the King of England by the island of Barbadoes and the other Leeward islands; but the only thing is, this is done in July, 1764, when it should have been October, 1763, or thereabouts.

[Lord *Mansfield*—It was after the proclamation and commission; for, I think, the proclamation was in October, 1763; the commission in April, 1764; and this is in July: So it is after both.]

That the governor took the patent imposing the tax with him, and therefore it must be taken that it should be imposed previous to calling an assembly.

Mr. *Wallace* continued—The patent is carried out by the governor. At the time he takes upon him the office of governor he promulges this tax: His first office as governor is to promulge it. Now the question is, whether the King, by this proclamation, meant immediately to waive the rights he had as conqueror of the island, or at a future period, when the state and circumstances of the island would admit of a legislature: When that would be was very uncertain. In fact, it does not appear that the first assembly met earlier than the latter end of the year 1765, (about a year and an half from the date of letters patent) nor does the verdict find that an assembly could have met sooner.

[698] The proclamation begins with a general direction to his Majesty's four governments, by name of Quebec, East Florida, West Florida, and Grenada. Then the assembly of Grenada, as to that part of the proclamation upon which this case turns, is to meet "as soon as the state and circumstances of the island will admit." Is it conceivable that in the mean while the King meant to divest himself of his right

right of legislation? There is no such declaration, it is impossible there can be such a construction.

If the King had not continued a right of making laws before the period of their having a legislature of their own, who was the legislator? Here is no relinquishment on the part of the crown in the mean while; but when an assembly meets the crown will hand over the powers of legislation to that assembly.

It is necessary in these distant countries to provide legislative constitutions within themselves, when circumstances will admit; they cannot be governed by ordinances or acts of parliament made for all cases and instances whatever. The best judges what laws are necessary and proper for the peace, tranquillity, and good order of the island, are the persons locally resident; therefore it is necessary some legislature of this kind should be established: But till it be, of necessity, every order of the King must be observed by the governor and the people.

But Mr. *Alleyne* has said the King has waived the right of conquest, by introducing courts of judicature; and that it is a part of the benefit of the introduction of the laws of England, that all the laws of the country not agreeable to these must be abrogated.

It is not usual in these times to take conquered nations under protection upon these terms: And as it is unusual, so I find, in the opinion of *Grotius*, it would rather be harsh and rigorous than indulgent. Your Lordship will remember that he says it is usual to suffer the inhabitants of a country conquered to possess their own laws, unless they are absolutely necessary to be abrogated, for the security of the conquering state. And similar is the opinion of *Puffendorf*.

Would it be for the security of the conquering state to introduce so dangerous, so total, so unnecessary a change: to alter the whole course of their law of property, by introducing the law of England to them, a peculiar law of descent, differing from all other; intricate and complex modes of conveyance; a new foreign unknown law; its very language unknown to them; by which those rights which have been the subject of contract must be divested; owners under a fair title dispossessed of their estates; settlements in consideration of marriage overthrown, for want of the forms essentially required in our law.

That the introduction of the English laws would make great confusion of property.

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That no more can be meant than that civil and criminal justice was to be established according to the laws of England for the good order of the state.

I conceive nothing more can be meant than that civil and criminal justice according to the laws of England were to be introduced, for the punishment of public offences, and the redress of private wrongs; and as far as might be for the prevention of both, in which the mode of trial, of conviction, and the whole legal process, is the common benefit to all.*

The lenity and excellence of our criminal laws is known throughout the world: More had been burthenfome; these were expedient and necessary.

Mr. *Alleyne* has compared the situation of this country with the other dependencies of the crown, particularly with Ireland.

It is true my Lord *Coke* held an idea of the laws of Ireland being established there by an Irish parliament, but in this he was singular; nor do I think the idea of their having been established there through the medium of an English colony is less uncommon, or promises more success.

That King John gave laws to Ireland as a conqueror.
V. *Calv.* case 23.
Sed. v. *Tyrril* Justice contra in that case.

In *Calvin's* case, before the chancellor, and all the judges, the case of Ireland is put as one of the conquered countries, and the title of *Henry* the second was accordingly King of England, and Lord of Ireland, &c. distinguishing between the title by right of conquest and his title as King of England. And King *John* gave them laws as a conqueror, and not by act of parliament, and this plainly appears in *Ventris*, in the case cited by Mr. *Alleyne*, where it is expressly laid down, on the authority of three of the judges, that Ireland was a conquered country, and in King *Henry's* time remained governed by its own laws, and so continued till his successor, King *John*, in the twelfth year of his reign, by charter, and not by act of parliament, introduced the English laws.

But if your Lordship had found that even by act of parliament the laws of England had been introduced into Ireland, would the least inference have followed that the King alone, by his legislative authority over a conquered country, could not have introduced them, or others, if he had seen expedient?

Wales and Berwick distinguished from Grenada, being claimed as parts re-united to the crown of England.

Neither Wales nor Berwick upon Tweed do, as I conceive, apply to the present question. They were not pretended to be holden in right of conquest, but as immediate fiefs under the crown of England, on the terms of the same feudal protection

* *Lex Angliæ est lex misericordiæ.*

protection and obedience by which England itself was then held, and as members re-united to the entire original tie; [700] for that was the claim, whatever was the fact. Nothing like this can be dreamed concerning Grenada; no dependence on England or Great Britain till the late conquest. And by all the difference between what is claimed as a re-union and what can only be claimed as a new acquisition, by right of arms, the cases differ.

Indeed, not relying on this, it has been thought necessary to endeavour a comparison between the case of this island of Grenada and the American colonies, of which, in general, the rise is known to have been from new discoveries of uninhabited countries, in which the discoverers were encouraged to settle by charter from the crown. No pretence of conquest: They could not live without laws; they could find no laws in an uninhabited country; what laws should they have, then, but the laws of England?

The colonies distinguished, as being settled in uninhabited countries.

But is this the case of a country already settled, where they find a people and laws? Will the laws of England expel those laws already established, fitted to the circumstances of the place, known and familiar to the inhabitants, to pass themselves into a country where they will be strangers, and for which they are not locally adapted?

That in a country already settled with different laws the English laws cannot enter as into a vacant possession.

Is it possible that British subjects, coming into a country where there are other laws, should carry the British laws with them thither, and not be governed by the laws of the country to which they are gone? Can it be supposed of a British subject going to Hanover, for instance?

As to the circumstance of an appeal to the King in council, as I do not think it necessary to lay any particular stress upon it, it may suffice to say, when the crown granted the charters under which the settlements were made, it was competent to the crown to prescribe the mode of appeal, which, in some form or other, by the royal prerogative, and for the benefit of the subject, necessarily lay in all the variety of disputes concerning the rights of the colonies. Narrowly as prerogative has been looked into, never has this branch been questioned, as not legal and constitutional.

That the appellants jurisdiction reserved to the King in council has never been called in question till now.

When a writ of error shall be brought before this court, to reverse a judgment given in the colonies, or a re-hearing moved, or by what name shall I call it, to examine in this court a decree in council, then will be the proper time for this question; but I believe that time will never arrive. They will look to that jurisdiction as they always have done:

They

They will find that redress which never yet has failed them. It would be a considerable acquisition to the business of this court if your Lordship were to sit here to exercise that appellate jurisdiction upon writ of error from the plantations, or in whatever form, for the practice is unknown to our books as much as the theory was to me till this day, in which so much ingenuity and argument has been employed to raise it.

And here I cannot help observing, that it is a great change in the language of America to insist as they have done, and do, that the parliament of England has no right to tax them, but that they derive their constitution from the King only; and now to say, in this cause, that the King has no power over them but as the head of the British constitution.

That the King did not waive his right of legislation over the conquered

But in this case, if the King by conquest had a legislative authority over Grenada till the assembly could be called, he has waived it. It is not said he has parted with it, (for how could it, when there was no body to take it) but he has waived the right.

island of Grenada till an assembly could be called; for that in the mean while it could not be out of the King, the body into which it was to be transmitted not being in esse.

I own, by what I can understand of the books, I have no idea of the possibility of the crown waiving a right. It must be more or nothing; it must be transferred to somebody else, or it remains in the crown; for in the crown is no laches, no negligent abandonment, least of all in such a point as this, so essential to order and good government.

But, not excepting to the meer term, at what period, to whom? To the assembly if to any body, for that is the condition of the grant. That when the state and circumstances of the island shall admit the calling of an assembly they shall be called, and shall meet and make laws; in consequence of which legislative power transmitted to him by the crown, and to be exercised by them, the King will *then* depart from his right of taxing them by his sole prerogative without an assembly. But this assembly did not meet till *after* the patent to the governor for raising this impost; they were therefore, liable to the impost; and it was *established* by the *proper* and *only* authority *then* in the island long before the assembly *could* meet.

I trust,

Michaelmas Term, 14 Geo. 3. K. B.

I trust, therefore, the court will think from the principles of reason and justice, that the proclamation for calling an assembly was, both in the words and intent of it, and in the necessity of the thing, executory; that the duty of four and an half per cent. was not executory, but immediate, and by legal authority, by virtue of the patent. And that it could not be meant that the calling of the assembly, under the authority and by the voluntary grant of the crown, should defeat the duty first legally imposed by the same authority, and therefore that the plaintiff is not entitled.

That the proclamation was executory, and the impost vested as it were in the mean while by the patent.

Mr. *Alleyne*, in reply—It is not to be wondered that I [702] should have expressed myself inaccurately; but so I certainly must, since I appear to be so much misunderstood by Mr. *Wallace*; the whole tenor of whose argument has been calculated to meet a supposed idea of mine, that the laws of England were introduced into Grenada solely by the proclamation of 1763. This was by no means the object of my argument.

Replication.

I contended that the proclamation was a recognition of the right of the inhabitants of Grenada, as British subjects, to be governed by the laws and constitution of England; of the practicability of reducing that right to practice, and the resolution of bringing in all its parts into actual execution as soon as possible: Therefore I cited the case of *Ireland*, and upon authorities, I hope, of more weight at this day, than *Calvin's* case: And I did infer that British subjects, settling in a conquered country, conquered by the arms of a King of Great Britain, carried with them their own laws and privileges; and that the moment the crown recognizes a colony of British subjects to have been settled, from that instant it engages its authority for securing to them all the rights and exemptions belonging to that character. And I thought I had proved that the practice of the crown had been conformable to this principle.

That the proclamation recognized rights of British subjects, and provided for the execution of them.

That British subjects recognized as a colony have all the rights of the original constitution.

But, to meet Mr. *Wallace* upon his own ground, who asked, supposing the crown entitled to exercise taxation over the inhabitants of Grenada, who were there, or should resort thither, indiscriminately, by right of conquest, how the crown had parted with this right, I acknowledge not

That if anterior to the proclamation the crown had a legislative authority

over the inhabitants and British subjects resorting to Grenada, that authority was renounced and given away by the proclamation.

properly

properly waived it? I answer, let us suppose for a moment that, anterior to the proclamation, the crown, as conqueror, had a power to raise a permanent tax on the then and future inhabitants of Grenada; and had the *vita necisque potestas*, the legislative authority in the fullest sense, when the crown declares they shall have a legislation of their own, and in the mean while be governed by the laws of England, I contend from that moment the King had parted with the right, supposing he had that right till then of imposing upon them himself, by his sole authority, a permanent tax. And I contend that the patent to Governor *Melville* repeated and enforced the grant, taking it as such for the present, in the most solemn manner.

In vain would it be argued that these grants of the laws of England were executory, and therefore might be suspended: Proclamations and patents such as these are not of such a flimsy nature, to be suspended, that is, virtually repealed, to be granted to-day, and resumed to-morrow. And if this cannot be denied, then the English laws were the laws of Grenada, either by prior right, or, as I have been willing to argue, since Mr. *Wallace* has laid so much stress upon the executory nature of the proclamation, by actual, immediate grant. And there is no one principle of English more decidedly clear than that the crown cannot, by its sole prerogative, enact a law.

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That principles of equity, from the consideration of the other islands, would not maintain the impost upon Grenada, because this is under claim of prerogative, there by act of their own assemblies.

It was next argued, that principles of equity require this duty to be imposed; because it is recited in the patent of the 20th of July that the Leeward Carribbee islands pay it.

To this there is first one general and conclusive answer—whatever equity, wisdom, or expedience there may be in the measure, it must be executed by legal means. The propriety of the object can never, in a legal view, sanctify the means taken;* but a particular answer is likewise ready.

The first place in which this tax was ever thought of was the island of Barbadoes; but there not imposed under claim of prerogative, but by a national act of their own internal legislature: And it was a grant for special purposes expressed, of building their prison, their courts of justice, their fortresses, and keeping them for the future in repair. And farther, in consideration of the confirmation of their

* Nil cuiquam expediat quod non per leges licet
Nil utile aut honestum quod legibus contrarium.

titles which had been lost, or were become obscure in consequence of the confusion of the island during the troubles of the preceding reign of *Charles* the first.

I must be particular in stating this. The first grant of Barbadoes was to the Earl of *Carlisle* from *Charles* the first: He divided the lands by subinfeudation amongst various purchasers.

During the troubles Lord *Carlisle* abandoned the island; the protector *Cromwell*, took possession, and made several grants of different parts of it; on the restoration the King made a new grant to Lord *Willoughby*, of *Parham*. In consequence of these several changes of property, and the violent and sudden revolution of affairs in the island, much confusion arose. The creditors of Lord *Carlisle* asserted their claim; the grantees of *Cromwell* held by very uncertain claims; and Lord *Carlisle*'s creditors succeeding would necessarily have defeated the grantees of Lord *Willoughby*. To settle these disputes the crown agreed to purchase the whole; and for the purpose of raising a fund to discharge Lord *Carlisle*'s debts, and the other purposes already mentioned, this duty was granted by the assembly of Barbadoes.

Your Lordship will find these particulars in the act set forth on the record, but more fully in Lord *Clarendon*'s answer to the seventh article of his impeachment, which is [704] in the continuation of his history, lately published.

I dare say Mr. *Wallace* will find the principles of equity not very cogent on Grenada, in a comparison with Barbadoes in this particular.

As to Nevis, Montserrat, and Antigua, with the English part of St. Christopher's, the same observations, in great measure, will occur. The grants of four and an half per cent. in these islands were likewise on special purposes, and were granted by their own assemblies.

As to the part of St. Christopher's conquered from the French, and ceded by the treaty of Utrecht, the very same claim was made in the reign of Queen *Anne*, asserted by an act of privy council, and exemplified under the great seal, the same which is now made upon Grenada, of imposing this duty by prerogative. The act was withdrawn; the duty never collected; the people warmly opposed; administration yielded, and consented to take it by act of assembly; a circumstance incredible, if they had not been convinced that the measure was unwarranted by law, and the

the opposition just. And when the duty was finally granted to the crown it was not only by assembly, but under terms.

So much, therefore, for an argument built on the principles of equity, comparing the imposition of this duty by act of prerogative in Grenada with the same duty in the other Leeward islands, by act of their own assemblies.

[Mr. *Wallace* observed the duty was imposed in 1703.

Lord *Mansfield* said it could not vary this question an *iota*: That the cause was put upon its proper footing; that he took it as admitted the duty was laid on in 1703, and added, it was raised long before the act, which was in 1727.

Mr. *Wallace* said the whole duty in that time amounted to but 30*l*. Mr. *Alleyne* observed on this that 30*l*. raised in 24 years was a strong argument that hardly any planter, at least any considerable planter, had submitted to pay.]

That not only as to the substantial difference in the authority levying, but in the ability to pay, Grenada was distinguished greatly to its disadvantage, [*705]

Mr. *Alleyne* continued—But farther, as to equality, besides the reason given, common observation will shew in what manner these new settlements in the island have been made. Large interest on loans payable yearly out of their estates. So far from additional burden, it might have been hoped from government that they would have assisted this infant colony, always much below the other settlements * when in the hands of its former possessors; and now, if this impost should prevail, miserably below indeed.

being a new settlement.

That communicating the benefits of a free constitution was never thought cruel in a conqueror, and seldom unwise.

But, not to want an argument, which cannot readily happen to the ingenuity of the learned counsel who supports the defendant's cause, if it be true that the proclamation in words appears fully either a conveyance or recognition of all the rights of British subjects to the inhabitants who were in Grenada, or should resort thither; and that the island is not under circumstances which should make a construction to support the impost favourable in equity, independent of higher considerations still against such a construction; yet Mr. *Wallace* argues that it must mean this, that there should be such an impost; because if there is not, the enjoyment of the laws of England is secured to the inhabitants, which will be an unwise and cruel construction. I believe Mr. *Wallace* is the first politician who ever thought that waiving the claim of conquest, and insuring to the conquered the blessings of a free government, was

was cruel. And how would it have astonished the wisdom of imperial Rome to hear that it was unwise!

Nor do our own writers omit to admire the policy of King *Edward* the third, in planting a colony in Calais, and of course communicating to that place the wise and beneficial laws of England, so firm a support of public order; so productive of security and happiness to every individual living under them.

I have the authority of the great and excellent Sir *Matthew Hale*, affirming this to have been his practice in his conquests, I have already observed, both in Scotland and Wales, and applauding it highly. At least this objection may be observed till the inhabitants of Grenada think this benefit a burthen, and complain of it as such. Mr. *Campbell*, certainly, for his part, does not complain, for he comes to claim the benefit of those laws, as his dearest birth-right: And it will be singular if it shall happen that any eloquence shall persuade any individual of Grenada that it is a reproach to the conquered to partake equally in those laws and constitution which are the glory and happiness of the conquerors, and the admiration of mankind; the English laws: And if they should rather choose to sink again into the state of a people under the hand of conquest than enjoy that equal liberty which abolishes all invidious distinctions between the conquerors and conquered.

That the inhabitants appeared not to have any such objection, nor could it be supposed, and certainly not the plaintiff.

The particular cruelty, however, which Mr. *Wallace* suggests is this; estates have been settled, contracts made, and things done with a view to the regulations of the law then prevailing; to alter this by the proclamation would harass and disappoint the parties, and annul their deeds.

Nothing can be more fallacious than this; for if at any time posterior to the proclamation any deed, contract, settlement, or any other matter of law had been brought into litigation, and appeared to have been transacted in conformity to the French laws, previous to the proclamation, and while the laws of *France* were in the island, those laws would have been adopted, and the instrument would have had its intended effect according to them; and the law of England would have taken notice of them, as it does of all foreign laws, where contracts are made under the authority of those laws; exactly as in cases which have happened in chancery and in this court—All mercantile contracts have this effect: And so it is allowed, as a settled rule of law,
in

* 2 P. W.
429.
Ter. Pasch.
1728.

in the case of *Freemoult* and *Dedire*. * The line, therefore, is sufficiently broad, and, at the same, sufficiently clear: And defined from the proclamation; the English shall prevail as to all subsequent transactions; till the proclamation, the French laws.

But in support of his general proposition, concerning the nature of the rights of a conquered people, Mr. *Wallace* has cited two illustrious names, names which I shall ever mention with the greatest reverence. Yet I have ever wished to argue from the sentiments of writers who have surmounted prejudices, and reasoned liberally, not devoting myself to the greatest name with an unlimited attachment. Great and extensive as their genius, their learning, their application was, it is well known to those who are conversant in their writings, that they have adopted in most places the positive constitutions of the imperial law, as abstract general truths of nature; hence in most places their reasoning is somewhat too confined for the universality of the subject, and in many liable to exceptions. Far be it from me, however, to speak irreverently of them; they have broken the ground, though they discovered not all the treasures of the soil; and though they might in some instances be mistaken in the true quality of the soil itself. And to their great labours the refinement of public law is originally owing.

With respect to the instances of prerogative intended to have been adduced to justify this I find only one mentioned, which, surely, cannot be supposed to support it by the comparison; the seizure of the *Massachusetts's* charter in 1683, in the reign of *James* the second. No man will wonder at the violence: The imprisonment of the bishops; the campaign of *Jefferies*; the seizures of every charter left by his brother were then as acts of ordinary justice at home. And when the city itself was not safe, we shall not wonder the *Massachusetts's* bay was invaded.

[707] Mr. *Wallace* has not chosen to argue the right of ultimate judicature in this court and in the House of Lords. He leaves me, therefore, at large with the observations I made on that point; and with a concession thus far at least, that there is no argument from experience to the contrary.

The last stress, on the close of the argument, was placed on the expedience and necessity of the power of legislation continuing in the crown till the legislature of the island actually sat.

This

This argument would go far indeed ; it would ultimately prove that in the recess of parliament the crown is arbitrary legislator of this empire, and may impose a permanent tax on Great Britain itself.

But the constitution has happily provided a power in the crown, by which it is enabled to obviate sudden emergencies ; or in cases not provided, bills of indemnity have always confirmed, by an act of state, what was required as an exertion of extraordinary power.* *Ne quid detrimenti caperet respublica* ; affirming and strengthening the general rule by the very means used to protect the necessary deviation, and which nothing less but such a solemn judgment of the collective body of the state allowing its necessity, can protect.

So in Grenada, from the first proclamation in October, 1763, to the session of the assembly in 1765, the crown had similar powers for obviating sudden emergencies, amongst the number of which powers a permanent tax cannot be esteemed.

I have now had the honour of submitting to your Lordships what considerations occurred to me in reply to Mr. *Wallace's* argument, of which it would ill become me to speak with disrespect ; I shall only say that it appears fairly answerable in the manner I have submitted.

And now, I trust, I may take leave of this subject by congratulating my client (for if better arguments were to have been found Mr. *Wallace* had discovered them) with being secure, and standing on a ground which will warrant my application to the court for judgment for the plaintiff.

CURIA ULTERIUS ADVISARE VULT.

[Note, After the argument Lord *Mansfield* said, the cause has been very well argued, 'There is one thing, however, which neither of you have defined precisely. Have you any idea a colony can be settled by British subjects without the intervention of the crown ?

Mr. *Alleyne*—If subjects settle on an island uninhabited, [708] for instance a shipwrecked crew, they cultivate, they inhabit. If the crown claims this island as a settlement by its own subjects, they have a right to say, give us a constitution, govern us by the laws of England or not at all. If it demands

* *Salus populi suprema lex esto.*

mands a tax they have a right to say, no: Till it be demanded legally in a constitutional mode.

Lord *Mansfield*—All colonies have been established by grants from the crown—I do not mean it as material to this question, but that it should be understood no colony can be settled without authority from the crown. As to the doctrine of those cases in *Salkeld*, I do not think much of it; it is very loose.

Mr. *Alleyne*—To meet the whole argument in the cause I at first stated, that this colony was settled by authority of the crown.

Lord *Mansfield*—I understood you so; let it stand for another argument.]

Afterwards in the same term on the 5th of May 1775, it was argued by Mr. *Macdonald* for the plaintiff, and Mr. *Hargrave* for the defendant, nearly to the effect following:

Mr. *Macdonald*—This is an action brought against a custom-house officer in the island of Grenada for money had and received. The object is to recover a sum of money levied by the defendant as a duty, and paid by the plaintiff; but paid, he contends, without legal consideration.

There is a special verdict, which, after what has been argued so fully and with so much perspicuity, it will be only necessary for me in point of form to state very shortly.

The jury find the island of Grenada in the West Indies, was in the possession of the French King, and conquered by the British arms; that there were several customs paid and payable to the French Monarch, upon goods exported and imported into the island. They find the surrender of the island to the King of Great Britain, in February 1762; in the articles of which the inhabitant are recognized as British subjects, and the same protection and privileges granted as to the other colonies of America. And that they should not be obliged to bear arms against his Most Christian Majesty, while the then war continued, and the fate of the island remained undetermined; that they should take the oath of allegiance; that they should be governed by their own laws, until his Majesty's pleasure should be further known.

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They find the treaty of the 10th of February 1763, by which the French King renounces Nova Scotia, Canada, and other countries to the King of Great Britain; and in 1763, the King of Great Britain, by his proclamation, assuring

During the inhabitants of his new conquests, and amongst them Grenada, of his paternal care; and that he has given order to his governors that, so soon as may be, they shall call assemblies, with power to the governor, with consent of the council and representatives so assembled, to make laws as near as may be conformable to the laws of Great Britain: In the mean time all persons may confide in his Majesty's royal protection, and the benefit and enjoyment of the laws of England. Then the proclamation proceeds, and constitutes a council to determine all civil and criminal causes according to the laws of Great Britain; the jury find a second proclamation in March 1764, reciting the benefit of a speedy settlement of the island of Grenada and the other islands; directing a survey of lands, and a certain number of men and women to be maintained on the lands under penalties; they further find that his Majesty, by his letters patent in April 1764, made *Robert Melville, Esq;* his governor in the island, in the room of Governor *Pinfold*, to act under instructions given and to be after given, ordering him as soon as situation and circumstances will admit to call assemblies, with full power to make and ordain laws, statutes and ordinances, for the welfare and good government of the people of the island of Grenada.

Afterwards by letters patent the 20th of July, 1764, they find a tax imposed by claim of prerogative in the same manner as in the island of Barbadoes the 20th of July 1764, of four and an half *per cent.* on commodities exported; they find the defendant levied the tax, and plaintiff paid.

The verdict farther finds the action brought by consent of the attorney-General.

I am humbly to contend before your Lordship, first, that no such tax could be imposed by prerogative.

And secondly, that admitting the crown by prerogative was intitled to have imposed such a tax, his Majesty by his proclamation of October 1763, prior to the instrument for raising such tax, has waived that right.

Your Lordship finds by the special verdict that the island of Grenada was conquered by the British arms in February 1763, and by treaty surrendered.

I take it to be clear that the sovereign of the state conquers not for himself personally, but for the state: And according to this I have a great authority, which I shall beg leave to cite to your Lordship.

Vattel—He says, it is asked to whom the conquest be- [710]
 longs, the Prince or state? This question ought never to B. 3. § 102.
 have

have been asked. Whose are the arms; whose the expence? If he conquered at his own, yet whose blood is shed? If he used mercenary troops, does not he expose his state to the resentment of the enemy?

I collect from the same author, who lays it down as a principle of the law of nations, if an uninhabited country be planted by British subjects, all the English laws which are the birth-right of every subject are there immediately; but if it be a conquered state which has laws of its own, those laws remain there until others are provided.

Lord *Mansfield*—Does he quote any authorities?

Mr. *Macdonald* continued—After a country is become part of the state he seems to take it, as a principle that it partakes of its constitution; and therefore not to think authorities necessary.

Lord *Coke's* reports—*Calvin's* case—That the King may alter or change the laws of a conquered country, but till he doth the former laws remain. This can only mean *flagrant bello* that he may do it; or in countries when the whole legislation is in the King.

Salk. 411. the difference of the facts in that case, prevents my quoting to your Lordship the decision itself; but upon the general principle what the court laid down was thus: In the case of an uninhabited country, all laws in force in England are in force there; but Jamaica having been a conquered country, and not found parcel of the British dominions, the laws of Jamaica stand in power till others are appointed.

[Lord *Mansfield* said upon this, the opinions are very loose and with a total ignorance of facts: Jamaica was conquered by *Oliver Cromwell*; I believe none of the conquered subjects remained.

It is absurd, that in the colonies they should carry all the laws of England with them; they carry only such as are applicable to their situation: I remember it has been determined in the council: There was a question whether the statute of charitable uses operated on the island of Nevis: It was determined it did not; and no laws but such as were applicable to their condition, unless expressly enacted.]

I would farther remark, that where the words “king” or “sovereign” in treaties of general law are introduced, I would understand them according to the nature of the state of which they are spoken, or to which to be applied.

[711] Those words of *Grotius*, *Rex et regnum*, translate them into Dutch, I should call the states general the king or sovereign;

reign ; and if into English “ king and parliament.” I don’t comend the formal part of the law of England, but the legislative part goes thither. If I am right in my idea of the law of nations, it confines the power of the conqueror, merely within the time of conflict, and whilst the sword is the only law to which either side can resort ; but when a country surrenders to the British arms, when military government ceases, what can come in but the law which governs every particular subject ; the legislation of Great Britain ? When the sword is once sheathed, I cannot conceive of the existence of any other power but the legislative power, the constitutional law, or government. The forms of their constitution may and must remain till the executive power diffuses those which obtain in his other dominions. I take it laying on imposts without consent of parliament was one of the great points on which the revolution turned ; and another revolution much earlier ; and *Magna Charta*, and almost innumerable statutes. When we talk upon this subject the present state of things is always out of the question, I shall therefore discuss the topic freely.

Lord *Coke* in his treatise on the statute of talliage says, no subject shall have money levied on him without consent of parliament ; and after goes farther and says, no man, that is I conceive who can call himself a British subject, though in another country, shall be taxed without his representatives.

Here upon the principle of the law of conquest, by what reason can the power extend over the conquering people themselves ; shall those who conquered with him share the fate of the conquered ? It would be repugnant to every principle of reason, and to every writer upon the law of nations.

Vattel, page 92, a principle of the law of nations, that wherever a nation settles and establishes a colony, that colony becomes a part of the dominion, and all that is said of the parent state applies to the colony.

Grotius says, that subjects settled in a country carry the same privileges they left behind them.

What is the difference between settling in a country uninhabited or inhabited ? As to the executive power they must wait the directions of that power ; as to the legislative the law is the same to them as that which governs me, and every man who hears me.

1624, March 17th, 25th, a bill brought into council.—It was that which restrained the fishery.

[712] The journal of the house says—The secretary said this is a conquered country, 'tis the King's; you have nothing to do with it: The parliament held they were part of the dominions of the state; they say the penalties and forfeitures are void, as not being by authority of parliament.

Sir *E. Coke* said, how not subject to parliament, why they pass by the King's letters patent?

To be sure it is true the King cannot grant penalties and forfeitures, for that would be imposing a tax under colour; and it is proved demonstrably the prerogative of the crown had not that power over them.

[Lord *Mansfield*—I take it those penalties were recoverable here.]

The consequence in the very next charter was a grant of a free fishery.

In the charter granted to Mr. *Penn* there is this remarkable clause, that no imposition shall be levied on the colony without consent of the proprietor and assembly, but by act of parliament in England. Calais was a colony.

[Lord *Mansfield*—Was Calais a colony? It was ceded by the treaty of Bretigny.]

Lord *Vaughan* 290 states writs of *non molestando*, issuing out of chancery to the mayor of Calais, and divers writs of error.

With regard to the other parts not colonized, all mandatory writs issued hence as they might do to any part of the King's dominions. Lord *Vaughan*, but without precedent, says, writs of error might issue to Ireland; I don't find however that remedial writs ever issued, but mandatory writs.

The conquest of Wales, by *Edward* the first, has already been very fully considered, and I find no reason to depart from the ground then taken. The language of that King was that every part of his dominions not in his possession was feudatory to him, *quia in proprietatis dominium totaliter concessa et tanquam pars corpori annexa et unita*.

From the conquest no instance of any but the legal authority exercised.

[713] The conquest of Ireland is the next. Co. 4th *Instit.* says that *H. 2.* ordered the laws kept in England to be observed in Ireland, and that he sent a transcript. *Leland* considered this as merely declaratory of the necessary consequences of the laws already received.

In *Harris's Hibernia*, from the records, a grant of *Felix Stephens*, with the wardships: This could not have been constituted

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constituted without manner of recovering according to the laws of England.

Lord *Holt* says, which concurs with this argument, it was not the mere conquest, but the subsequent settling, which let them into the same rights with the other subjects.

In Mr. *Petit*, 80, to shew the commons of England sat separate before the 37 *H. 3.* a register is cited.

In the 28th of *Henry* the third, by the queen regent to the archbishops, bishops, &c. of Ireland, to assemble. Therefore Ireland, Wales, Scotland, all partook of the constitution; all were and are exempt from taxation by prerogative. I have spoken already of Pennsylvania; the same argument will apply to the other colonies; the same to Grenada.

But secondly, even if the colonies are not exempt from such taxation by prerogative, except the King waive and renounce it, has not the King barred his right?

The capitulation requires liberty of selling lands. They are allowed to sell them to British subjects.

They desire the laws of Antigua and St. Christopher's, which, except a few local ordinances, are the same as in England, and they are promised in answer that they shall be considered as British subjects.

7. October, 1763, That all persons may rely on the royal favour of Great Britain till the assembly can be got together, courts of justice are to be erected, with authority over causes criminal and civil, as near as may be to the laws of England.

Then in March it takes for granted they have relied on the encouragement and assurances of the former proclamation, and a survey and distribution of lands is ordered.

Then by the patent creating Mr. *Melville* governor of Grenada and the other islands he is ordered to call an assembly as soon as possible, for the purpose of making laws. I can see nothing stronger than the language of the proclamation.

That proclamation was said to be executory. "The [714]
" calling an assembly is merely discretionary in the gover-
" nor." Shall the effect of the proclamation be suspended
on that event? Must we construe "I give the law of
" England until you have an assembly" to this, "You shall
" not have the laws of England till you have an assem-
" bly."

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The legislature of the colonies might make such addition of local ordinances as they should think fit.

One of the benefits is this proclamation.

On what authority was the proclamation? The King had no right to levy the tax 20 July 1764, unless under the patent in April. We need only compare the dates.

But it is said there is no law at all. If the King has not, who has? I answer, the supreme legislative power of the state. The stamp-act prevailed at that time.

It is a principle in contracts between political bodies contracting, still more necessary than between private persons, that the grant once made, can never be recalled, and cannot be released till the conditions of the contract are broken by one or the other.

This compact is what every speculative writer requires in his closet; what practice requires in all ages between nations; and which mutually and irreversibly bound both parties.

As to the island of St. Christopher's, the opinion of Lord *Hardwicke* and Sir *E. Northey* is observable.

Argument
ab responsis
prudendum.

They certify they have prepared a draught of several laws of four and a half per cent. on the conquered part of St. Christopher's, as far as they thought the condition would permit, conformably to the proclamation 1703, which was in the time of the war.

That Sir
Philip
Yorke and
Sir Clement
Worge said
that if Ja-
maica be
considered
as a con-
quered
country the
King can
impose a
tax by pre-
rogative,
otherwise
not.

Sir *Philip Yorke*, 22, and Sir *Clement Worge*, attorney and solicitor-generals, were asked how far the King could, by his prerogative, levy a tax on the island of Jamaica. If Jamaica is still to be considered as a conquered country, the King has that right; but if it be in the situation of the other islands the tax cannot be levied, unless by act of assembly, or of English parliament.

[Lord *Mansfield*—I believe your report is wrong.]

* It was said the tax was expedient; if it is meant it is expedient to them to have their money taken from them (but I can't conceive how that should be) the tax is very expedient: But I have no doubt the court will consider whether it is lawful, and upon that ground rest, with good expectation, the cause of the plaintiff.

[*715]

[Lord *Mansfield*—They allow the validity of the letters patent of 1764, so far as they annul the poll duty; this comes in lieu of it.

Note, It seems they were never paid after the conquest, and there was an interval of two years.]

Mr.

Mr. *Hargrave*, on the other side—When I consider the great importance of the question which arises on the case, and how ably and learnedly it has been argued, I feel a great difficulty, and with the burthen of answering so learned an argument had been left to an abler person, in a question of so great importance. However, I am the less anxious since it is certain that the law must decide, and not the abilities of the speaker.

There are two questions; first, Whether the King has a right to levy impositions on the island of Grenada by prerogative?

The two questions in the cause.

2dly, Whether if there be such a right, it was not, in this case, barred by the proclamation?

It is not necessary to argue what are the rights over a conquered country. To destroy, to kill, to commit depredation, are what I shall not argue. But the making of laws I apprehend to be one certainly. Express stipulations are undoubtedly to be rigidly observed: But where there are none the conquered country becomes subject to the legislative power of the conqueror; not liable to any restrictions but those of natural justice and equity.

That the right of making laws is one essential right of conquest.

This will not go far towards deciding the general question, in whom that legislative power resides.

I apprehend the authorities concur in attributing that power to the King, as a part of his prerogative.

That this is in the King.

Your Lordship observed the authorities were so confused as not much to be depended on. True, as to the history of facts; but as to the principles of law they are clear.

The earliest is *Calvin's case*, 7th *Coke*, 17. A distinction between counties vesting by conquest and descent. The doctrine imputed to the judges by my Lord *Coke* is not entirely extra-judicial.

He takes a difference between the conquest of a christian kingdom and the kingdom of an infidel: This has been long enough justly exploded, but will not prejudice the rest.

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Distinction in *Calv.* between christian and infidel country reprobated; but that the principal points are not.

[Lord *Mansfield*—Don't quote the distinction, for the honour of my Lord *Coke*.]

He goes on—he might at his pleasure alter and change the laws of that kingdom; but till he doth make an alteration, the laws of that kingdom remain.

When

Admitted that when he has given the laws of England the legislative power of the King solely ceases.

Sir John Wytham v. Sir Richard Ditton. 3 Mod. 159.

Blanchard v. Galdy.

When he has given the laws of England his legislative power ceases, and they are only subject to the legislation of the parliament.

The doctrine so given is the opinion of all the judges, and is not entirely extra-judicial, as given in answer to what was said by counsel taking a distinction.

Before and since the revolution the same prerogative has been acknowledged in the crown. The first case 3d Mod. 159. *Shower's P. Cases*, 24, against the governor and council of Barbadoes, for false imprisonment. Counsel for the plaintiff argued that, according to *Calvin's case*, the King might impose laws on a conquered country, but denied that Barbadoes was a conquered country: The judgment for the plaintiff was reversed in the House of Lords.

The next case, *Blanchard and Galdy*, after the revolution, *Cumberbach*, 128, the court held that the statute did not extend to Jamaica; because, being a conquered country, the laws of England did not extend to it till introduced by the conqueror or his successors.

2 *Peere Williams*, 75, said by the master of the rolls to have been determined in council, that in an uninhabited country they carry the laws of England with them. And in the case where the King of England conquers a country, the conquerors, by saving the lives of the people conquered, gains a right and property in such a people; in consequence of which he may impose on them what laws he pleases. The principle may be wrong, but not the general inference.

Doctrine in 2 P. W. that a conqueror by saving their lives gains a property in the people conquered reprobated.

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The opinions of Lord Coke, Sir John Davies, and Molyneux, concerning the conquest of Ireland.

[Lord Mansfield—It is very ill expressed in the report. The master of the rolls never expressed himself so.]

Then, as to other countries; first, as to Ireland, there are very different opinions. *Coke* holds the laws were introduced by *John*, and that *Henry* the second gave laws to them as a conquered country; * but that now no King can alter them without authority of parliament.

4 *Iust.* 304, allows *Henry* brought them in.

Molyneux argues against the authority of the English parliament, "They were not introduced by conquest, but by their own desires and consent." *Davies* seems to argue, more conformably to historical facts, that the laws were not introduced *simul & semel*, but gradually, and were not universally prevalent till the third year of *James* the first. It is remarkable, however, though the writers are different in opinion, not one denies the introduction of the English laws

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laws to belong to the King by prerogative over a conquered country, except *Molyneux*.

The next instance is the conquest of Wales by *Edward* the first. There is a doubt whether the first act was an act of parliament or a charter. *Coke* calls it a statute, so does *Piowden*, 126, so does *Hale*; but *Vaughan* doubts it, and *Barrington* denies it. *Vaughan* allows (and he was not a prerogative lawyer) that *Edward* the first might institute laws without parliament. P. 400.

[*Lord Mansfield*—*Edward* the first considered Wales as an ancient fief of the crown. My Lord *Vaughan* does not make that distinction.]

I now come to America and the colonies there. All of them derive the whole form of their government from an exertion of the royal prerogative. Their courts of justice, their assemblies, their power of taxation, flow from the same source, however impure it may be thought.

Colonies.

That they flow from royal prerogative.

10 April, 1606. The King vests the power of government in persons who shall be appointed by consent, and also imposes two and an half per cent. impost. This was before the revolution; but even since there have been authorities: The case of *Blanchard* and that in *Peere Williams* have been always cited.

Impost in 1606 by prerogative.

In 1636, the government of New England having been seized into the hands of the crown, King *James* the second appoints governors to regulate taxes: They were to continue the old till other should be settled. I should be ashamed to quote an instance of prerogative in *James's* reign if not supported by lawyers who lived soon after the revolution.

Tax imposed by Ja. 2. supported by an opinion, after the revolution, of *Ld. Somers*.

In 1689 the Lord *Somers* gave an opinion, when attorney-general, in the case of *Usher*, who denied the legality of the tax, and said the revenue officers were liable to an action. This case, unless the difference be of taxes to continue or new created, is very strong.

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[*Lord Mansfield*—But it did not clearly appear whether their opinion came officially or upon a private case.]

Lord Mansfield—That it did not appear this was an official opinion. Opinion stated.

“ I conceive Mr. *Usher* would not be liable to an action, at a time when the corporation was in the King's hands, and the former government ceased.”

[*Lord Mansfield*—They considered the charter, being vacated, the same as if it had never existed, and they went on without charter till 1694 or 1695.]

Lord Mansfield—That the opinion went on the dissolution of the charter.

The other opinion was, that if the judgment was good, which remained unreversed, the tax would be good: This was

was Sir G. Treby, I think. Some don't go so largely, but they make no difference between a conquered country.

[Lord Mansfield—You mistake: The charter being vacated, they held they were to be taxed, as the province, by commission.]

Sir E. Northey's opinion for the impost.

Sir E. Northey, as to the conquered part of St. Christopher's, held the Queen by commission might impose taxes; for that by prerogative she might impose laws of every kind on a conquered country.

Sir Philip Yorke and Sir Clem. Worge.

A more recent case. In the reign of the late King Sir Clement Worge and the then solicitor-general were consulted, whether taxes might be imposed by prerogative; their answer was, if Jamaica was to be considered as a conquered country they might.

Objection, that argument from ideal analogy will not do, nor from what prerogative should be, but what is the fact and the law.

We are not to compare the case with analogy to the English constitution. It might be more conformable to the general constitution, it might be more convenient, it certainly would be more uniform, were the colonies on the foot of Ireland; but we are not to enquire what ought to be law, but what actually is. We are not to enquire whether the prerogative is broader than it ought by that analogy, but how it really stands. If it requires restraining, that is the business of parliament.

As to the conquered part of St. Christopher's, the opinion was, the law extending to such part of St. Christopher's as belonged to Great Britain when the law was made, they cannot be subject to the law; but the Queen might, if she pleased, issue letters patent, which would be law there, and would bind conquered countries.

This was the opinion of the now chief justice of the Common Pleas when attorney-general.

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By the articles of capitulation they were to become British subjects, but be governed by their own constitutions till the King's pleasure be farther known.

The great question arose on the proclamation and letters patent, whether both were executed or executory, and to what the calling of assemblies extended.

That the proclamation is not a gift, but a promise to give.

The proclamation was not a gift, but a promise to give. I insist upon it the legislative power was not transferred from the crown till there was an assembly capable of receiving it. The principal point argued last time was what I am now considering, and was then so ably argued by Mr. Wallace, that I think it not necessary to add any thing. The question was, whether not only the English laws passed in the

the form of administering justice, but the English constitution.

[Lord *Mansfield*—There are three instruments.

Proclamation.

Survey.

Commission to the governor.]

Mr. *Hargrave*—I don't quote the second, because only regulating the lands.

[Lord *Mansfield*—It recites the proclamation, and engages persons to come and settle.]

I wish there had been authorities clearer on the subject. They are, perhaps, very much weakened by historical inaccuracies; but still, I submit, they are uniform in their principle, and fully justify the defendant.

Mr. *Macdonald*, in reply—The question of prerogative in the time of *James* the first was short. *James* measured the understandings of his subjects by the rule of three, and found they were to those of the King as the brass studs in a saddle to the stars in the firmament. Perhaps he measured their right to liberty and his of command by the same proportion.

But, as to what has been done under claim of prerogative, I conceive it to be stronger that it was done and revoked than if it had never existed.

All the other precedents talk of a conquered country [720] without distinguishing.

[Lord *Mansfield*—*Nevis* is mentioned as one of the instances that the conquered country is in the power of the King; not exclusive of the constitution, because the King has no power exclusive of parliament.]

My Lord, they would be subject to all the inconveniences of a double government.

[Lord *Mansfield*—Why, are they not? They are subject to their own acts—and are they not at the same time subject to parliament?]

Mr. *Macdonald*—My Lord, I hold that is a question detached from this.

And which ever way it be held, the plaintiff is not contending it before the court; I hope so far as he is he has the opinion of the court on his side.

Mr. Justice *Willes*—I think as soon as ever the King has passed an act he gives up his authority, whatever it was before.

On one side they prayed a farther argument, on the other the judgment of the court. As being a revenue question it stood

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stood over. It was argued about two hours and an half. Lord *Mansfield*, immediately after the argument, expressed his readiness and inclination to give judgment.

On Monday the sixth of June it was moved for farther argument. Stood over till the Tuesday se'ennight.

Tuesday 14th of June.

It was entreated it might stand over till Friday.

Lord *Mansfield*—I don't see any inconvenience in going over till next term. It is your own delay. It is absolutely impossible to give judgment this term. Suppose we were all agreed, many matters are thrown out in argument which are not absolutely necessary in the decision, but of which it would be necessary to the court to take notice.

[721] What the value of the French duties may be I don't know: It does not appear in the case. Suppose the court should be against the imposition of those duties which are imposed in lieu of the French, there would arise a question concerning those duties.

Can you have any doubt upon the most material argument of all?

The importance of the first question made by Mr. Macdonald.

The first question made in the second argument by Mr. *Macdonald*, I think, is one of the greatest constitutional questions that, perhaps, ever came before this court. As my brother *Aston* is absent, I wish, principally upon that account, that it may stand over. It is impossible it should ever be passed over in silence.

Mr. *Campbell* moved that judgment might be given upon the former argument, but Lord *Mansfield* reminded him that he could get no farther, because it must necessarily come into the Exchequer; and even if that were not the case judgment could not have been given in the term, both on account of the absence of Mr. Justice *Aston*, and as the last day would be a Wednesday.

7th of November, 1774.

The Grenada cause came on for the third argument by Mr. Attorney-general on the part of the crown, and Mr. Serjeant *Glyn* for the plaintiff.

Mr. Serjeant *Glyn*—This case, one of the most important in its principles, and in the consequences dependent on the decision, that was ever argued, comes before the court on a special verdict, stating that the island of Grenada was in possession of the French King, and conquered by his Britannic Majesty's arms in 1762. The inhabitants permitted to sell their lands to the subjects of Great-Britain only by the articles of capitulation in 1763.

Proclamation,

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Proclamation, reciting the benefits from a regular colonization; promising that assemblies shall be called, with power to make laws: In the mean while the subjects to con-
de they shall be governed by the laws of England.

Provision made of legislation to be executed by the governor 9th of May, 1764. Patent to the governor to call an assembly as soon as convenience shall admit.

Proclamation 20th of July, 1764, for levying an impost of four and an half *per cent*.

Stated—Assembly called about the end of the year 1765.

State of custom of the other islands, The impost by [722]
Assembly.

State of St. Christopher's, only where there's a difference of collection; part having been subject to the King of France.

They find the impost levied on the plaintiff by the defendant; and that it is upon the impost so levied this action brought. And on the whole matter if the money legally collected, then they find for the defendant; if not then they find for the plaintiff.

The question is—whether the King has a power, without the aid of an assembly or parliamentary regulation, to impose any tax upon the inhabitants of the island of Grenada?

The provision for peopling the island, the commission to Governor Melville for the well governing of the island, are not material.

I cannot help taking notice of the principle, on which the claim of the King is founded, to the raising of this impost, which is, that the King has a right to exercise a despotic power over a conquered country, annexed to the dominion of Great Britain; and that this power is legally, permanently and uncontrollably in him. I think, though it necessary to this decision, it will throw light upon many points contained in it.

If it could be shewn that the law had asserted this, and that contrary decisions had denied it; that the course of history proved it; that it had ever been asserted; that there were no times in which the exercise of it had been disputed, or if there were that it had never been judicially contradicted; and that the King had always exercised it: However disagreeing with our principles it might appear, and however dangerous to the constitution that the King should have independent dominion; yet if it were so upon the authorities as stated, I should hold it a very formidable argument; and if I hold that the opinions have been silent, that there have

The argument for the defendant built on an absolute power in the crown over a conquered country, annexed to the dominion of England.

have been no decisions; that the course of our history has no vestiges of it, that it never has been exercised; and that every hint of it has been rejected with disgust.

That of *Calvin* was a question, whether a *post-natus* of Scotland was a natural-born subject of the King of England, after the union; it was held he was, because the centre of unity was in the person of the King. No necessity of entering into the discussion whether it be Lord *Coke's* opinion, or of the judges.

The general definition is—of a King of a conquered people, and a proposition is laid down generally.

723] “ If the King make a conquest of a christian country, “ their laws remain till he gives them others; but if he “ make a conquest of an infidel country, they are presum- “ ed to have no laws, he may give them what laws he “ pleases; but guided by natural justice and equity.” I quote this not for the sake of any thing but the use I shall make of it by and by, shewing, that a subsequent authority went to that only; and this was an idea which was not received by your Lordship the last term, but rejected with a declaration, that for the honour of Lord *Coke* it ought not to be spoken of; as I hope it never will.

That the term King must mean the sovereign power, whether in one or many.

He is speaking of a King, not particularly the King of this country; if it were to be understood to belong to any King it would be evidently wrong as to Poland, or as to the constitution of Sweden. If a conquest be made by a King of Poland by a Popish army, it is made not to the King personally, but to the King and Senate of Poland; and of Sweden at that time.

A very respectable author was cited to your Lordship, by Mr. *Mackintosh*, who very ably argued from his book, that all acquisitions by conquest are made for the state; and are therefore at the disposal of those who make them, that is to say, the state according to its several constitutions, and different distributions of legislative power.

In agreement with this author, who states the doctrine in a decisive manner, I think it clear the conquest made by the state, for the benefit of the state. Execution and administration of all laws in England is in the crown; the power of making laws according to the constitution of the state which he governs here is in the crown, with the other parts of the legislature. When Lord *Coke* gives his opinion, he must have taken it from writers of general law, and those for the most part of absolute monarchies; and for

recd

took the word King as a general word, which in their sense of it comprehends the whole constitution.

Objected, That Lord *Coke's* authority must be taken otherwise, because it has been understood in other cases to belong to the sole powers of the King; and it was taken on this authority, the King had the right of making independent laws over a conquered country; and that a King was in the same state even as to a colony, unless otherwise provided by charter.

It is said in *P. W.* the same point was determined. *P. W.* instead of speaking of the bare power of the King, spoke of the power of a conqueror.

The concession said to be made by Sir *B. Shower*; and [724] that it was of consequence to them to have denied the position, if capable of being denied; was in the case of an island not inhabited when first passed by patent; so if a conquest gave any right, he said it must be over the persons of the conquered people, not over the country.

Upon a state of the history of *Jamaica*, supposition of fact being mistaken, the argument that is applied fails. That position, so justly reprobated in *Calvin's* case, is the point affirmed.

The opinion contended to be settled in that case of *Blanchard* and *Galdy*, is founded on my Lord *Coke's* taking them, without civil policy, to be governed arbitrarily, according to the pleasure of the King, as he should think equity and justice; if the concession be any thing it is to be applied to that point; which ought not to be named in a court of justice. This is the principal ground of a case which, from its inaccuracy, gained so little weight with your Lordship upon the last argument; if there had been others, the industry of the learned gentlemen who made the best of the last argument for the defendant, would have produced them. Taking the expression from a public writer, I apprehend my Lord *Coke* meant merely to state the principle, not applied to any particular country; and then the King, when applied to England, means not the King solely, but the King and parliament. It is the most natural and rational construction, and is such, I think, as the argument admits.

I think it can never escape your Lordship, that by Lord *Coke* writing without precedents or authority, must necessarily refer to the writers of public law. Mr. *Macdonald* has well observed, those writers generally used the word Emperor or King as an arbitrary power including the whole.

If

If Lord Coke is supposed to have laid down the point, it must have been from the history of his country, and that the King from the earliest times exercised this prerogative. Though I should not have laid great stress upon authorities deduced from dark and unsettled times; nor from our *Henries*, or even our *Edwards*, to prove, from the exercise of an act of power, the legality of the claim; (when even in that reign, when the great charter was given, there were so many violations of it, and so many afterwards, and so many confirmations otherwise not necessary.) Though for these reasons, I cannot allow much weight to acts in claim of a prerogative in those reigns, there is no instance of an absolute authority by the King over a conquered country. I don't mean to waive the benefit of what has been so ingeniously argued, with respect to the introduction of laws into Ireland by the charter: But I think Mr. *Maddens* has produced an argument in proof, that the laws of England existed before that time, as it refers to them.

[725]
That it is
part of the
duty of the
King of
England,
to provide

I think, therefore, an English constitution had passed; and in general that it's part of the duty of the King to provide, that the English constitution shall be exercised every where over all the subjects of England, however conquered, however acquired, or wherever their situation.
for the establishment of the constitution of England, over every country subject to the crown of England, however acquired or wherever situated.

The power of promulgation of laws, issuing of laws, the making preparations and proper regulations, for the introduction and execution of those laws in a country so lately receiving them, is the peculiar prerogative. Though there is an antecedent title by birth or situation, it can only be exercised by means of the trust reposed in the crown, so as to be applied to the benefit of the public.

The enquiry is not what is expedient for the peculiar good of mankind so much as what is necessary or capable of being admitted. Where new laws have been to be introduced or old ones altered, it has always been by the act of the supreme legislation openly either here or over the states in Ireland. If the providing for the execution of an ancient right be called legislation, we will readily allow this legislation to have always existed in the King. But it is necessary to prove this authority that the King has abrogated, altered or introduced laws. This has not been done, the King has never; and the very expression of an idea of such
a right

a right has been rejected with resentment and indignation as against the constitution.

And to say, if allowed, that the King legislatively introduced laws in Ireland, by providing for their being received and executed, is to say that he performed this executive trust, which we all allow; and if this be meant a legislation, it is a salutary and necessary legislation. I know if it be, it hardly will be so interpreted as belonging to that name.

With regard to Wales, (I presume many other instances will not be found of conquered countries,) the statute has always been considered as an act of parliament.

The peculiar authority given to King *Edward*, which could have been by no means necessary, if there had been a legislative power absolutely and dependently in him (and which power was never exercised, and held by the judges so ill agreeing with the constitution, as to be confined to the person of King *Edward I.*) is a strong inference the regulation was not originally and properly in him, as of his own independent right, but derivatively from the parliament; and that in such a manner as to be at least confined to himself, and not extend to his successors.

If King Edward had been possessed of the power, he would not have received it from parliament.

The King would never have furnished such an argument [726] against the exercise of legislative authority, had that power then resided in him.

All the cases have been the objects of parliamentary regulations. If he had understood it to be of his right to give laws over those countries arbitrarily, and parliament had recognized this claim; the power of making and altering, the power of abrogating would have been in him, and we should not have had the interposition of parliament.

From the author cited by Mr. *Mackdonald*, I will state the position.

That all conquests are made for the benefit of the conquering state; and wherever the people are composed and pay allegiance, instead of constrained submission, then they are subjects; and owe obedience to the laws of the conquering state, and hold their property from them.

When this conquest was made, from that hour when the King's right was recognized and a composition made, it was for the benefit of the people of this country. Here particularly, its conquest being made with a view to colonization, it is established by the best authority, that of Lord *Vaughan*, on the question, whether a naturalization in Ireland made a man a natural-born subject of Great Britain?

Lord

Vattel's
proposition
concurs
with Lord
Vaughan.

Lord *Vaughan*—A conquest is not solely for the benefit of the conqueror, but of the subjects; and those who come to reside there have a right to acquire property; lands by purchase;—and be protected in all those particulars, by the laws of their mother country.

The inhabitants then of Grenada, are the objects of all those provisions.

They may acquire property, with the right of residence and purchase; and have the other rights of British subjects.

As to expedience or value, we are not speaking to the equality but the legality; and what has taken a part has the same claim, to half or the whole.

The authority is inconsistent with that right which Mr. *Campbell* had as a resident, if nothing else were affected by it.

[727]

It will be incumbent, by new arguments, to prove a power in the crown of disposal of these acquisitions, without the concurrence of the constitution.

Will this right bear the examination of the laws of England.

That this is
not a tem-
porary or-
dinance.

Ordinances of necessity, on instant emergencies, provisions for the administration of constitutional rights—I shall not presume to say how far these may be maintained: But they must expire with that necessity, and be occasional and temporary only.

No pretence
of necessity.

In the present case, no pretence of a necessity.

A conquest of the people, and not of the lands, must mean a power most extensively taken in the times of barbarism, but qualified in these times.

On a con-
quest, the
laws of the
conquerors
are imme-
diately con-
veyed as the
common
right of all
the subjects,
conquerors,
and conquered.

Both in the case of the conquered and conquering people, the laws of the general government are upon the conquest conveyed thither, as a common right of all the subjects: But they require to be actually carried into effect, maintained and executed by that power in which the execution of the laws is lodged, which with us, is in the King. The title is there before the enjoyment; when the King has executed that trust, then is the enjoyment.

and conquered.

But they
require the
executive
power to
inforce the
actual exer-
cise.

The colonies cannot have the power of enforcing those laws, they have the right, though the trust is reposed in the King to effectuate them.

The

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The King has given assurance that they shall be protected in all their rights, honours and possessions, and the free exercise of the Roman catholic religion—this to the conquered; shall the conquerors be in a worse state?

The King has provided, that, as immutable laws may become inconvenient, therefore there shall be a local one, subject to alteration by their own legislature.

A distinction is taken between Grenada and the other islands; I answer the grant is not a matter of grace and favour, but the discharge of a trust. If it be a gift it is not revocable, but an irrevocable right; what distinction then between the other islands, whose rights the King has recognized by receiving the imposts as a benevolence.

No distinction between Grenada and the other islands; the matter not being of favour, but the grant.

of right antecedently, or at least by

What power antecedent to the patent had existed in the King is annihilated then. Even considering them as subject before to the sole law of the conqueror, and not as subject to the legislative power of the state, the King has waived the power of taxation if it were admitted he had it before, by granting them assemblies to tax themselves. [728]

The construction cannot be that the inhabitants are not to reap the benefit till a future time: This is so inconsistent with the end, with the construction in which the grants of the King are always received, and the benefit designed, that it will find no weight with your Lordship. Second point, that the power of taxation if in the King before, is relinquished by granting them assemblies to tax themselves.

Taking it by way of argument that the conquest has annihilated their antient laws, their law cannot have been annihilated and none given them in their place.

If their ancient constitution is gone, the laws of England by their proper force introduce themselves.

It is a future grant, it is said—when the power is given them to call assemblies, they have a provision for a legislature: I dont mean to derogate from the supreme legislature.

The assembly is to be called when circumstances will admit and convenience shall require: So it is here; but yet it is the unalterable privilege of this country.

The people to come, in confidence of the promise of the rights of British subjects, would in this construction come, and find themselves without one of the most remarkable of those rights, and that which secures all. They would, on coming to reside, find themselves subject to an arbitrary disposal of their property, and might have the whole taken away without their own consent.

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My Lord, on the whole of the case I presume, whether as a conquered people or as colonies, they had a right to tax themselves, and were not subject to imposts under any claim of prerogative, without their own consent.

Secondly, If they had been subject to taxes by prerogative, that the King, by his proclamation, has concluded himself from this right.

Mr. Attorney-General for the defendant.

[729]

Mr. Attorney-General—I have ever looked on this as one necessary ground of argument to a doubtful question, that we should see and attend to the nature of the claim, its fitness and expediency; and not confound the idea of it by substituting, in its place, something of a very different nature, and supposing that to be the right which is insisted on and intended to be proved.

That the claim is not of an absolute legislative power; but a subordinate legislation.

If I had been to contend for an absolute independent legislative power in his Majesty, I have not that idea of authorities, or of the duties of my profession, that I could have engaged myself in the task of supporting it. Nor should I have thought it a proposition fit to be spoken of in any place, much less in a court of justice.

Without taking that for my ground, I mean to insist that his Majesty, as an article of executive power, has an authority, legislative in its nature, but subordinate to the supreme legislature: A right of imposing laws, and empowering others to impose them.

Such power delegated by the King to a corporation.

When I shall refer to corporations in England invested with powers to provide laws over part of the dominions of the King of England, from which they were distant, and not natives or inhabitants, I shall think myself entitled to contend that a power which he can delegate he can exercise in his own personal authority.

A method has been taken which requires the right to be considered in rather a different view, and examined in a different mode.

I think it has been endeavoured to be insinuated, or rather declared, that in the article of conquest the laws of England instantly take place in the conquered country, and the conquering people carry the English laws with them. At the same time this point has been contended it was argued that the King, by his executive power, was to establish those laws.

By the subordinate authority to the Lords and Commons, which I consider as much subordinate with regard to the dominions acquired to the King, as to the state and dominions

ons of the state here, the King regulates the government, and requires imposts from the country, in such manner as he sees requisite.

But it is said "only particular necessity justifies this claim, and it must be only occasional and temporary: When the sovereign authority has found it expedient to give laws for particular local necessity, every individual carries with him all the laws of England;" that is, it may frequently happen laws subversive of the laws given, the individual then will have a power denied to the Sovereign.

I have the authority of the same celebrated author (quoted on the other side) that there is no difference between a country conquered by the arms of another, and discovered. *Vat. f. 203—10.*

It was stated in the last argument, in order to shew whether a country is conquered it becomes part of the conquering people, and their laws are introduced with the conquest, that in *Calvin's* case this point had been decided. The question there was, whether the dominion of the conqueror or only the realm is included.

[730]

The laws of the conquered remain till altered. They have been accustomed to them as modes of regulating and disposing property. They know no other: If there be better, and more complete in their own nature, they are satisfied with their own; they have been accustomed to look up to these for protection on all occasions, and to enjoy under them all the blessings and comforts they have enjoyed.

The question is, whether by the laws of Great Britain, which are the only rule here, the King has been advised justly, and acted within the compass of those laws; or whether those laws are exceeded? This is merely the question.

My reason for stating that dominion and property were acquired by conquest was, because I shall infer that the constitution has intrusted the King with the disposition of the property, and with the ordering of that dominion conquered; subject to the legislation of the country.

The King, both in conquests and colonies, has had this right: There has not been an instance in which the King has not exercised the disposition of the laws and property of the conquered country.

He has granted by his charter the island of St. John.

The King may exercise the right of disposing the lands conquered. With respect to the laws, if we should be car-

ried back to the conquest of Ireland, (which, I think, remains in great doubt, whether by *Edward* or King *John*, or whether indeed completely till the reign of *Elizabeth*, at any period) the great loss of the records of Ireland has made it impossible to go into an accurate discussion. Lord *Coke* is of opinion that, in point of fact, *Henry* the second did give the laws of England to Ireland. King *John* was not, in truth, the Sovereign of Ireland; the actual Sovereign was *Henry* the third. It was not till after two descents had been cast that King *Henry* the third granted the English laws.

That this legislative power of the King was exercised over Ireland.

Supposing King *John* gave them those laws, or that they were established there before. It is contended this was a mere act of executive power. It will appear to what extent this power, called executive, was carried.

[731]

On the subject of the English laws another ambiguity runs: That it is not only the laws of property and punishment of crimes, but the political laws and constitution of the country.

Suppose the King could not make, nor authorize to make laws occasionally, the authority of parliament would be necessary to make the change.

So of Scotland.

With respect to Scotland, whenever they did call a parliament, it was by the King's command and instance, as at Newark; and it is too much to say that the King, in the character of an executive magistrate, has a right not only to create assemblies, but to appoint their meeting; and also that he carries with him, as a part of merely executive power, the power to alter laws.

So of Wales.

With respect to Wales, though I believe in my conscience it was in fact obtained by no better pretence than by that of the sword, yet *Edward* did not consider it as such.

That in the town and castle of Calais the English laws were not used, but in the staple, for convenience.

Plowden, 126. There is no pretence that the ordinance then made was by King, Lords, and Commons: The King considered it as a fief under his own personal dominion.

With regard to many places in France taken certainly by right of conquest, and ceded by the treaty of Bretigny, my doubt is, whether the English laws came thither.

With respect to the market of Calais, the resort of English introduced the laws there, for convenience, but not in the castle, nor in the town of Calais.

With respect to Minorca, the laws of England do not take place there.

In the year 1713 they were referred to certain of the council, the archbishop of Canterbury, and others; in the year

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1727 somewhat was done; in the year 1740 a little more: In 1752 the privy council sent over a great multitude of laws, but the war interfered.

[Lord *Mansfield*—This, I think, was after the complaint against Governor *Melville*.]

1606. King *James* grants a charter, with a power of making laws, and an exclusive fishery, from 34 to 35 degrees of latitude, to the corporation of Plymouth.

Grant in 1606 to the corporation of Plymouth.

* It is said this charter came into parliament. They came because an exclusive fishery had been granted to a corporation residing at Plymouth, with a power of imposing penalties. [*732]

The objection was, that at the time the corporation of Plymouth had not sent colonies.

Charter of Massachusetts bay, with power to call assemblies, granted by the King; vacated and granted a-new after the revolution by King *William*.

I observe when a passage has been cited from the history of former times it is the custom to say they were bad times. Where are we to look for the history of this country but in those times, separating the bad from the good?

In the case of St. Christopher's there were given by eminent lawyers very distinct opinions, in favour of the right in the crown to impose duties. I don't recollect there was any evidence of want of exercise of that right, yet it was contended against because an act of assembly twenty-five years after granted the duties.

St. Christopher's.

Yet if one was to infer from every act that has been made in any of the political constitutions of this country there was no law before that act was made, it would subvert most of the most important laws of this country.

It was said the King might have enacted a law, but only before the times of the actual surrender; but that after it surrendered to the sovereignty it becomes part of the conquering state in a different right; and the ordinances must be only temporary till the King and parliament provides others.

From the moment the conquest has established itself, from the instant in which he has compelled the inhabitants to give up their arms, there is not any hour in which the parliament cannot bind it.

Suppose this ordinance had been before the capitulation and cession, would it have ceased because by the treaty of peace the King of France says he cedes all his right to the King

King and crown of Great Britain. What does the treaty more than affirm the right of Great Britain, by ceding all right or pretensions of right. If his Majesty thought fit, after having imposed one sort of laws, to give another repugnant sort of laws, or the parliament were to do this, it would be by an authority acting in subversion of the first.

[733] This drives on to another inconsistency upon the claim of political liberty.

The King by his conquest acquired a power to provide laws for his subjects, a power which has been so repeatedly and extensively exercised in other instances.

Has the King superseded that right? The proclamation, it is said, gives the English laws to all the subjects. It was said that it presumed the laws of England prevailed in the country, and that it made a provision in the commission to be given to the judges. What, that they should bring those laws which, by this hypothesis, were there before!

That the proclamation did not convey the political constitution of this kingdom. The proclamation might convey the English laws, but not the political and constitutional system in general in this kingdom.

The promise is said to be the same which the King gives here. I don't know by what record it appears that the King has engaged himself to his subjects of this country, that, when convenience shall permit, or occasion shall require, he will permit a parliament to be called.

That by the proclamation it was left discretionary, whether the five islands should form one assembly, or each apart. The King, by his commission, empowers the governor to call a parliament when he shall think convenient, or receive instructions: And his authority was so much executory, that he might have established assemblies either of the five islands together, or Grenada apart and severally.

It would be of the utmost danger to this constitution to say, till the King or parliament gives them a constitution he might act in full power, without any laws to decide.

The commission to call assemblies was not executed till above a year after the patent imposing the duty.

In the case of chartered governments the argument would, undoubtedly, take a different turn. It might be said a charter is a grant of an interest to persons named in the grant; but in this nothing could pass, but the constitution existing till some new grant.

The special verdict has not found the time in which the commission passed the great seal. The patent passed for raising the tax in July; the governor did not go over till October; both came together. The King, therefore, had introduced his claim to the impost on the country prior to the time in which any assembly could be called; for his right was introduced the very instant of the governor's landing: And the elder right, in the King especially, will be preferred above all, when it appears the proclamation could not be intended to waive the impost.

The patent for raising the impost arrived with the governor.

[734]

In reply Mr. Serjeant Glynn—Before I go into the general question I shall speak upon two important points, though an end is made of the case, and the object satisfied to the plaintiff by the decision of the last. The other is so great and important an one in the general consideration that I am persuaded your Lordship will not pass over in judgment.

Serj. Glynn.

The tax is contended to be legally levied, upon a claim of which the very stating of the case proves the illegality.

My learned friend has set out with disavowing the claim of an absolute independent sovereignty in the crown; but he has maintained his argument and was obliged to maintain his argument upon it.

He says it is a subordinate legislature. A subordinate legislature, in this sense at least, is difficult to be conceived to those who know not how to make dependence consist with independence: But the state of Grenada distinguishes itself. It is a tax imposed by an act of legislative power, which includes the entire legal sovereignty; but it is not an uncontrolled authority, because the King, with consent of parliament, may depart from this claim, so as to bind his successors: The supreme legislature may repeal it. The King makes an essential part of that legislature. Is it a mark of a limited subordinate authority, that he can impose without them what they cannot take away without him? And that he may depart from this is what any man may do in any instance of the most uncontrolled legislative authority.

That the idea of its being a subordinate authority, because the King with the parliament may annul it, is fallacious, the King himself being one essential part of the parliament.

My learned friend says it is a subordinate act of legislation; an act of execution, not of legislation. It does not depend upon the King whether the laws of England introduce themselves, because the parliament may alter or appoint laws. The King may levy taxes by his sole authority, which shall stand

stand in force till parliament repeals them, which they cannot without him.

That there can be no medium in this thing between an absolute legislative power in the person of the King and an executive trust.

I believe my learned friend will hardly prove this power vested in the person of the King. It was the great point our Hampden contended, that no tax can be imposed by the authority of the King. It must, therefore, depend solely upon the question, whether the King has an absolute independent legislation; or whether the power of the crown is not truly executive.

[735]

The promulging and introducing administration of the laws of England we admit to be in the King, as his peculiar and necessary trust; the making, altering, or suspending of those laws, we deny.

Notwithstanding the observation on the government of Scotland, the states were convened in the first instance of *Edward's* claim: And if he claimed it as a fief, and obtained as a conqueror, still he governed it as a King of England, with executive and not legislative authority.

Wales in proprietatis dom. totaliter cum integritate conversa et tanquam pars corpori annexa et unita.

As to the claim of a feudal duchy in Wales, it does not appear that the King ever introduced any laws but the laws of England: And when he considers it expressly, as intimately and vitally connected with England, as a part to the body, in one entire dominion, can it be doubted whether he understood that he was to govern it by the laws of England.

That it does not appear any prince made laws for Ireland independently of the English parliaments.

Whether Lord *Coke* is right in supposing King *John*, or any other prince, introduced the laws of England into Ireland, I don't think is material; unless it appears some prince, by his authority, made laws and regulations there, without the concurrence of the English parliament.

The case of the corporation of Plymouth was a power delegated to make laws to bind themselves.

The King has the power because it has been delegated. The case was not that the King, in the grant to the corporation, made laws to bind others without their consent; but he empowered them to make laws which should bind themselves. The case is so far from proving a power to make laws contradictory to the laws of England, that it only proves the power of the King to convey the laws of England.

And because the King can erect a corporation which shall make bye-laws obligatory upon the particular community, therefore

therefore the King, it is inferred, can make laws which shall bind those who never gave their consent to them.

The strongest authorities, uniform experience, as well as the principles of the constitution, and rules of law, are against it.

Selden's opinion is against it, and the other great law-<sup>Authori-
ties.</sup>yers. It has the testimony of the best constitutional law-
yers, of which no age was ever more fruitful than that of *Jam^s* the first, to negative it. It ought to have been not unsupported by precedents. The character of the prince who is made the example of the claim ought to have been other: He ought to have been a prince who hated prerogative; who was desirous of keeping the right of the crown within its constitutional limits, and by no means of extending it beyond.

The next are mere private opinions given by great law-^[736]yers, but in private. Though they will have great weight, as far as extra-judicial opinions in courts of law, they are not leading principles of decision: And had any private opinion been decisive this cause had never been now before the court. No man reveres opinions of men of great abilities more; but there is not the opinion of any man which, standing simply on the footing of authority, I shall not think it permitted to question: And even the greatest have been heretofore questioned successfully. I never could be deterred by great opinions when I considered by what authorities the liberty of the press has been opposed; by what authorities the claim of ship-money was supported; and what the event was upon both those questions.

What was done upon the forfeiture of the charter, be-<sup>What was
done after
the revolu-
tion only a
temporary
provision.</sup>fore the revolution, is no authority; but rather an argu-
ment of error. After the revolution some lawyers gave
their opinion for collecting the revenues as they used to be
collected; this was done only in the interval of suspension
of legislature.

A question of this nature, a power of a kind like this is not to be gathered from authorities and circumstances such as have been stated. Mr. Attorney-general was supposing an instant abrogation of all former laws. I did not say so when it was a conquest. There are some unalterable laws to continue. As to the objection made of claiming of property, the mode must remain till the King appoints by his executive power.

My Lord *Vaughan* says the subjects don't acquire a pro-<sup>No argu-
ment or
it dispute</sup>perty in the soil. If the inhabitants had been turned out of

about the
property of
the soil.

it it would have been in the King. In the idea of this country the property was originally in the King of all lands. If Mr. Attorney-general has been contending on this as a feudal right, the argument would have had weight; but we are not arguing for the property of the soil.

The subjects of England have a right to the English laws: They have a right to assemble: And the reason why the King never says to them that he will call assemblies as soon as convenience permits and occasion shall require is, because in this country convenience always permits, and occasion requires. But still the trust of calling them is reposed in the King.

Mr. Attorney-general, after having discussed the point of sovereignty in the case of Ireland, with respect to their assemblies, has said this is in execution of authority in the King; if so then the laws were there before, and assemblies called upon the same terms as in England. And that the acts concerning them were by authority of parliament.

[737]

With respect to the power of the King to make laws.

He can make no other laws than what shall have been made by the constitutional assemblies; he can repeal none; nor alter without them.

Mr. Attorney-general says that by his proclamation the King promises that he will grant them the privileges of British subjects; but then this promise cannot take effect before the governor lands, and an assembly is called: and immediately on his landing, and before an assembly can be called, he has a right to levy imposts.

That the
promise is
obligatory
from the
time of is-
suing it.

I take the construction to be, that the promise takes place from the time of issuing it: A constitution takes place immediately. We are not less governed by the laws of this country because a parliament is not constantly sitting.

This cannot be distinguished from the case of any other colony; and if the power claimed be in this case disallowed, the colonies in general will then act all of them with the same dependence on the supreme legislature, and the same conformity in the principles of the British constitution. If otherwise, there will be British subjects under the same name, and with the same nominal rights, some free and others in unconstitutional subjection.

Lord Mansfield—I don't remember its being argued on this case on the question whether there is any authority which considers *Bretigny* as a part of the dominions of the crown of England. *Acquitaine* and *Poitou* be held as heir to the house of *Anjou*.

The

The parts separated from the crown, and considered as feudal, were governed by a despotic authority. It appears that Calais had the process and judicial writs of this court. Writs of error returnable to this court.

How do you understand the capitulation?

A cession is not necessary to a conquest; it is not necessary for the right. Jamaica never has been ceded, I believe, to this hour.

How do you understand the capitulation? There is an article that they shall pay no other duties but what they paid to the King of France.

Mr. Justice *Aston*—First of all in this special verdict the articles of capitulation, some of them, are stated. I don't understand how the capitulation and treaty of peace agree. [738] But I am to judge upon the verdict.

28 November. *Campbell and Hall.*

Judgment of the court was this day given by Lord *Mansfield*.

In this cause of *Alexander Campbell* against *William Hall*.

This is an action brought by the plaintiff, who is a natural-born subject of Great Britain, and who, upon the third of May, 1763, purchased lands in the island of Grenada. And it is brought against the defendant, *William Hall*, who was collector for his Majesty at the time of levying the impost, and of the action brought, of a duty of four and an half *per cent.* upon goods exported from the island of Grenada. And it is to recover a sum of money which was levied by the defendant and paid by the plaintiff, as for this duty of four and an half *per cent.* for sugars which were exported from the island of Grenada, from the estate and by the consignment of the plaintiff. Case.

And the case is laid upon money had and received; and plaintiff, as for money paid without consideration, the duties having been imposed without sufficient or lawful authority to warrant the same, demands judgment to recover the same against the defendant.

And it is stated in the special verdict that the money is not paid over, but continues in the defendant's hands, by consent of the attorney-general, for his Majesty, in order that the question may be tried.

The special verdict states Grenada to have been conquered by the British arms from the French King on the seventh of February, 1762. The island of Grenada ceded by capitulation;

tulation ; and the capitulation upon which they surrendered was by reference to the capitulation upon which the island of Martinico had been surrendered.

The special verdict then states some articles of that capitulation, particularly the fifth, which grants that Grenada shall be governed by its own laws till his Majesty's pleasure be known.

Continuance of property, religion, honours, privileges, and exemptions, is demanded. They are referred to the article last stated for answer, which is, that the inhabitants being subjects of Great Britain, will enjoy their property and the same privileges, derived from their subjection, as his Majesty's other islands.

[739] Eighth article, 'That they shall be subject only to the capitation tax imposed by his Majesty the King of France, expences of justice and public government to be paid out of the King's domain.

Referred to the 7th article, which states the rule—and refers to the duties paid by the inhabitants of the Leeward islands.

The next instrument is the treaty of peace the 10th of February, 1763, which states the cession, and other articles not material.

The next and material instrument which they state is a proclamation under the great seal, the 7th of October 1763, reciting thus :

“ Whereas it will greatly contribute to the settling of our
 “ said islands, of which Grenada is one, that they be in-
 “ formed of our love and paternal care for the liberties and
 “ rights of those who are or shall be inhabitants thereof ;
 “ we have thought fit to publish and declare by this our
 “ proclamation, that we have by our letters patent under
 “ our great seal of Great Britain, whereby our said govern-
 “ ments are constituted, giving express power and direc-
 “ tion to our governors of our said colonies respectively,
 “ that so soon as the state and circumstances of the said co-
 “ lonies will admit thereof, they shall, with the advice and
 “ consent of our said council, call and summon general as-
 “ semblies, in such manner and form as is used in the other
 “ colonies under our immediate government. And we
 “ have also given power to the said governors, with the ad-
 “ vice and consent of our said council and assembly of re-
 “ presentatives as aforesaid, to make, constitute and ordain
 “ laws, statutes and ordinances for the public peace, wel-
 “ fare,

“ fare and good government of our said colonies and the
“ inhabitants thereof, as near as may be agreeable to the
“ laws of England, and under such regulations and re-
“ strictions as are used in our other colonies.”

Then follow letters patent under the great seal, or rather a proclamation of the 26th of March 1764, whereby the King recites, that he had ordered a survey and division of the ceded islands, as an invitation to all purchasers to come and purchase upon terms and conditions specified in the proclamation.

The next instrument stated in the verdict, letters patent on the 9th of April 1764, gives commission and authority to *Robert Melville*, Esq; appointed Governor of this island of Grenada, to summon assemblies as soon as the situation and circumstances of the island would admit; and to make laws in all the usual forms, with reference to the other plantations where assemblies are established.

The Governor arrived in Grenada the 14th of December [740] 1764; before the end of 1765, particular day not stated, the assemblies actually met: But before the arrival of the Governor in Grenada, indeed before his commission, and before his departure from London, there is another instrument upon the validity of which the whole turns.

Letters patent under the great seal, bearing date the 20th of July 1764, reciting that in Barbadoes, and all other of the British Leeward islands, a duty of four and an half per cent. is paid upon goods exported; and reciting farther:

“ Whereas it is convenient and expedient, and of great
“ importance to our other sugar colonies, that the like du-
“ ties should take place in Grenada; we do hereby by vir-
“ tue of our authority and prerogative royal ordain that an
“ impost of four and an half per cent. in specie shall, from
“ and after the 29th day of September next, be raised and
“ paid to us, our heirs and successors, for and upon all
“ dead commodities of the growth or produce of our said
“ island of Grenada that shall be shipped off from the
“ same, in lieu of all customs and impost duties hitherto
“ collected upon goods imported and exported into and out
“ of the said island, under the authority of his most Chris-
“ tian Majesty, and that the same shall be collected: Then
“ it goes on with reference to the island of Barbadoes and
“ the other Leeward islands.”

The jury find that in fact such duty of four and an half per cent. is paid to his Majesty in all the British Leeward islands.

And

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And they find several acts of assembly which are referrible to the state of the several islands, and which I shall not state, as they are public, and every gentleman may have access to them.

These letters patent of the 20th of July 1764, with what I stated in the opening, are all that is material in this special verdict.

Upon the whole of the case this general question arises, being the substance of what is submitted to the court by the verdict: “Whether these letters patent of the 20th of July 1764, are good and valid to abrogate the French duties, and in lieu thereof to impose this duty of four and an half per cent.” which is paid by all the Leeward islands subject to his Majesty.

That the letters are void has been contended at the bar, upon two points.

[741]
1st Point.

1st. That although they had been made before the proclamation, the King by his prerogative could not have imposed them.

2d Point.

2dly, That although the King had sufficient authority before the 20th of July 1764, he had divested himself of that authority by the proclamation.

Propositions.

A great deal has been said and authorities cited—relative to propositions in which both sides exactly agree, or which are too clear to be denied. The stating of these will lead us to the solution of the first point.

1st. That a country conquered by the British arms becomes subject to the crown, and therefore state or legislation of Great Britain.

1st. A country conquered by the British arms becomes a dominion of the King in right of his crown, and therefore necessarily subject to the legislative power of the parliament of Great Britain.

2d. The conquered are subjects, not aliens or enemies.

2dly, The conquered inhabitants once received into the conquerors protection become subjects; and are universally to be considered in that light, not as enemies or aliens.

3d. Articles of capitulation and cession sacred and inviolable.

3dly, Articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent.

4th. The law and legislation of

4thly, The law and legislation of every dominion equally affects all persons and property within the limits thereof, and

and is the true rule for the decision of all questions which arise there: Whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there.

5thly, Laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontrovertible; and the absurd exception as to pagans, in *Calvin's* case, shews the universality of the maxim. The exception could not exist before the Christian æra, and in all probability arose from the mad enthusiasm of the Croisades.—In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their present laws, until his Majesty's pleasure be further known.

6thly, If the King has power (and when I say the King, I mean in this case to be understood “without concurrence of parliament”) to make new laws for a conquered country, this * being a power subordinate to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects.

gainst the laws of trade or authority of parliament, or giving privileges exclusive of his other subjects.

The present proclamation is an act of this subordinate [*742] legislative power: If made before the 11th October 1763, it would have been made on the most reasonable and equitable grounds; putting the island of Grenada on the same footing as the other islands.

If Grenada paid more duties, the injury would have been to her; if less, to the other islands.

It would have been carrying the capitulation into execution, which gave hopes, if any new duties more were laid on, their condition would be the same as that of the other Leeward Islands.

The only question which remains then is, whether the King had power after the 4th of February 1763, of himself, to impose this duty.

Taking these propositions to be granted, he has a legislative power over a conquered country, limited to him by the constitution, and subordinate to the constitution of parliament; and a power to grant or refuse capitulation.

If

That the
jus belli et
pacis is in-
trusted with
the King,
property in
the con-
quered
lands and
terms of
conquest,
and the
constitution
of the conquered country.

If he refuses, and puts to the sword or extirpates the inhabitants of a country, obtaining it by conquest, the lands are his; and if he plants a colony, the new settlers share the land between them, subject to the prerogative of the conqueror. If he receives them into obedience and grants them property, he has power to fix a tax. He is intrusted with the terms of making peace at his discretion; and he may retain the conquest or yield it up, on such condition as he shall think fit to agree.

This is not a matter of disputed right; it has hitherto been uncontroverted that the King may change part or all of the political form of government, over a conquered dominion.

Historical
application
of these
principles.

To go into the history of conquests made by the crown of England. The alteration of the laws of Ireland, has been much discussed by the lawyers and writers of great fame. No man ever said the change was made by the parliament; no man, unless perhaps Mr. *Molyneux*, ever said the King could not do it.

[743]

The fact, in truth, after all the researches that could be made, comes out clearly to be as laid down by Lord Chief Justice *Vaughan*.

Ireland.

“ Ireland received the laws of England by the charters
“ and command of *H. 2. King John*, *H. 3.* and he adds,
“ &c. to take *Edward*, and the successors of the princes
“ named. That the charter 12 *King John*, was by assent
“ of parliament in Ireland, he shews clearly to be a mis-
“ take. Whenever a parliament was called in Ireland,
“ that change in their constitution was without an act of
“ parliament in England, and therefore must have been
“ derived from the King.”

Mr. *Barrington* is well warranted. The 12th of *Edward* 1st. called the statute of Wales, is certainly no more than a regulation made by the King as conqueror, for the government of the country, which the preamble says was then totally subdued; and however for purposes of policy he might think fit to claim it as a fief, appertaining to the realm of England, he could never think himself intitled to make laws, without assent of parliament, to bind the subjects of any part of the realm. Therefore, as he did make laws for Wales without assent of parliament, the clear consequence is, he governed it as a conquest: Which was his title in fact, and the feudal right but a fiction.

Berwick,

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Berwick, after the conquest of it, was governed by charters from the crown, till the reign of *James* the 1st, without interposition of parliament.

Whatever changes were made in the laws of Gascony, Guyenne and Calais, must have been under the King's authority; if by act of parliament that act would be extant, for they were conquered in the reign of *Edward* the third; and all the acts from that reign to the present time are extant; and in some acts of parliament there are commercial regulations, relative to each of the conquests which I have named; none making any change in their constitution and laws.

Yet as to Calais, there was a great change made in their constitution, for they were summoned by writ to send burgesses to the English parliament; and as this was not by act of parliament, it must have been by the sole act of the King.

With regard to the inhabitants, their property and trade, at Gibraltar, the King, ever since that conquest, has from time to time made orders and regulations suitable to the condition of those who live, trade, or enjoy property in a garrison town.

Mr. Attorney-General has alluded to a variety of instances, several within these twenty years, in which the King has exercised legislation over Minorca. In Minorca it has appeared lately, that there are and have been for years back a great many inhabitants of worth, and a great trade carried on.

If the King does it there as coming in the place of the King of Spain, because their old constitution continues (which by the by is another proof that the constitution of England does not necessarily follow a conquest by the King of England) the same argument applies here; for before the 7th of October, 1763, the constitution of Grenada continued, and the King stood in the place of their former Sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King *Charles* the second changed their constitution and political form of government, and granted it to the Duke of *York*, to hold from his crown under all the regulations contained in the letters patent.

Gascoigne,
Guyenne
and Calais.

Gibraltar.

[744]
Minorca.

That as in
Minorca
the Spanish
constitution
subsists, so
in Grenada,
before the
7th of Oc-
tober 1763,
the French.

New York.

Reason assigned why there are no cases. That there never was a doubt but the King had a legislative power over a conquered country.

It is not to be wondered that an adjudged case in point is not to be found; no dispute ever was started before upon the King's legislative right over a conquest: It never was denied in a court of law or equity in Westminster-Hall, never was questioned in parliament.

• page 17. Lord Coke's report of the arguments and resolutions of the judges in *Calvin's case* lays it down as clear. (And that strange extrajudicial opinion, as to a conquest from a pagan country, will not make reason not to be reason, and law not to be law, as to the rest.) And the book says,* that if a King—I omit the distinction between a christian and infidel kingdom, which as to this purpose is wholly groundless, and most deservedly exploded—"If a King come to a kingdom by conquest, he may, at his pleasure, alter and change the laws of that kingdom; but, until he doth make an alteration, the ancient laws of that kingdom remain: But if a King hath a kingdom by descent, there, seeing by the laws of the kingdom, he doth inherit the kingdom, he cannot change the laws of himself without consent of parliament. (Plainly speaking of his own country where there is a parliament.")

"Also, if a king hath a kingdom by conquest, as King *Henry* the second had Ireland, after King *John* had given to them, being under his obedience and subjection, the laws of England for the government of their native country, no succeeding King could alter the same without parliament. Which is very just, and it necessarily includes that King *John* himself could not alter the grant of the laws of England."

[745]

Besides this, the authority of two great names has been cited, who took the proposition for granted. And though opinions of counsel, whether acting officially in a public charge or in private, are not properly authority to found a decision, yet I cite them;—not to establish so clear a point, but to shew that when it has been matter of legal enquiry the answer it has received, by gentlemen of eminent character and abilities in the profession, has been immediate and without hesitation, and conformable to these principles.

In

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In 1722, the assembly of Jamaica refusing the usual supplies, it was referred to Sir *Philip Yorke* and Sir *Clement Worge*, what was to be done if they should persist in their refusal.

The opinion
of Sir Philip
Yorke and
Sir Clement
Worge in

1722, with respect to Jamaica.

Their answer is—"that if Jamaica was still to be considered as a conquered country, the King had a right to lay taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed upon the inhabitants, but by an assembly of the island, or by an act of parliament."

The distinction in law between a conquered country and a colony they held to be clear and indisputable; whether, as to the case before them of Jamaica, that island remained a conquest or was made a colony they had not examined.

I have, upon former occasions, traced the constitution of Jamaica as far as there are books or papers in the offices: I cannot find any Spaniard remained upon the island so late as the restoration; if any, they were few.

Hardly any
of the old
inhabitants.

A gentleman, to whom I put the question on one of the arguments in this cause, said he knew of no Spanish slave of the white inhabitants of Jamaica; but there were amongst the negroes.

The King, I mean *Charles* the second, after the restoration invited settlers by proclamation, promising them his protection. He appointed at first a governor and council only; afterwards he granted a commission to the governor to call an assembly.

Original
constitution
of the colony
in Jamaica.

The constitution of every province immediately under the King has arisen in the same manner; not by the grants, but by the commission subsequent to call an assembly. And therefore all the Spaniards having left the island, or having been killed or driven out of it, the first settling was by an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his crown. [746]

The like is the case of the islands of St. Helena and St. John's, mentioned by Mr. Attorney-General.

A maxim of constitutional law with all the judges in *Calvin's* case, and two such men in modern times as Sir *Philip Yorke* and Sir *Clement Worge*, I take it for granted will acquire some authority, even if there were any thing which otherwise made it doubtful; but on the contrary no book,

no saying of a judge, no not even an opinion of any counsel public or private, has been cited; no instance is to be found in any period of our history where it was ever questioned.

Opinion on
the second
point.

The counsel for the plaintiff undoubtedly laboured this point from a diffidence what might be our opinion on the second.

But upon full consideration we are all of opinion that before the 20th of July, 1764, the King had precluded himself from an exercise of the legislative authority by virtue of his prerogative, which he had before over the island of Grenada.

'The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the King says, and with what view he says it; how and to what he engages himself and pledges his word, "whereas it will
" greatly contribute to the speedy settling our said new
" governments, that our loving subjects should be in-
" formed of our paternal care for the security of the liber-
" ties and properties of those who are and shall become
" inhabitants thereof; we have thought fit to publish and
" declare by this our proclamation, that we have in the
" letters patent under our great seal of Great Britain, by
" which the said governments are constituted, given ex-
" press power and direction to our governors of our said
" colonies respectively, that, so soon as the state and
" circumstances of our said colonies will admit thereof,
" they shall with the advice and consent of the members
" of our council summon and call general assemblies (and
" then follow the directions for that purpose.) And to
" what end? To make, constitute and ordain laws, sta-
" tutes, and ordinances, for the public peace, welfare and
" good of our said colonies (of which this of Grenada is
" one) and of the people and inhabitants thereof, as near
" as may be agreeable to the laws of England."

With what view is the promise reciting the commission actually given? To invite settlers; to invite subjects. Why? The reason is given. They may think their liberties and properties more secure when they have a legislative assembly. The governor and council depending on the King he can recall them at pleasure, and give a new frame to the constitution; but not so of the other which has a negative on those parts of the legislature which depend on the King.

Therefore

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Therefore that assurance is given them for the security of their liberties and properties, and with a view to invite them to go and settle there after this proclamation that assured them of the constitution under which they were to live.

The next act is of the 26th of March 1764, which, the constitution having been established by proclamation, invites further, such as shall be disposed to come and purchase, to live under the constitution. It states certain terms and conditions on which the allotments were to be taken, established with a view to permanent colonization and the increase and cultivation of the new settlement.

The 26th
of March
1764.

In farther confirmation, on the 29th of April 1764, three months before the impost in question was imposed, there is an actual commission to Governor *Melville*, to call an assembly as soon as the state and circumstances of the island should admit.—You will observe in the proclamation there is no legislature reserved to be exercised by the King, or by the governor and council under his authority, or in any other method or manner until the assembly should be called: The promise imports the contrary; for whatever construction is to be put upon it, (which perhaps it may be somewhat difficult to pursue through all the cases to which it may be applied) it apparently considers laws then in being in the island, and to be administered by courts of justice; not an interposition of legislative authority between the time of the promise and of calling the assembly.

Patent of
the 29th of
April 1764.

It does not appear from the special verdict when the first assembly was called; it must have been in about a year at farthest from the governor's arrival, for the jury find he arrived in December 1764, and that an assembly was held about the latter end of the year 1765. So that there appears to have been nothing in the state and circumstances of the island to prevent calling an assembly.

We therefore think by the two proclamations and the commission to Governor *Melville*, the King had immediately and irrevocably granted to all who did or should inhabit, or who had or should have property in the island of Grenada—in general to all whom it may concern—that the subordinate legislation over the island should be exercised by the assembly with the governor and council, in like manner as in the other provinces under the King.

And therefore, though the right of the King to have levied taxes on a conquered country, subject to him in right

[748] right of his crown, was good, and the duty reasonable, equitable and expedient, and according to the finding of the verdict paid in Barbadoes, and all the other Leeward islands; yet by the inadvertency of the King's servants in the order in which the several instruments passed the office, (for the patent of the 20th of July 1764, for raising the impost stated should have been first) the order is inverted, and the last we think contrary to and a violation of the first; and therefore void.

How proper soever the thing may be respecting the object of these letters patent, it can only now be done (to use the words of Sir *Philip Yorke* and Sir *Clement Werge*) "by act of assembly of the island, or by the parliament of Great Britain."

The consequence is Judgment for the Plaintiff.

[*Note.* I have here again the pleasure of returning my thanks to Mr. *Atteyne*, by whom I have been favoured with the copy of the special verdict in this remarkable cause. I have also used some materials largely with which I have been obliged in the first day's argument; the crowd being then so great that I was hindered in taking notes of my own; and for the same reason I have used the liberty in the judgment of supplying what I found imperfect or mistaken in my own notes in several places, from a printed note of it which has been published; and correcting that in some places where I found it mistaken.]

Habeas Corpus.

Blissets Case.

ON a return to an *habeas corpus* issued at the suit of the father of the child.

Cause was shewn that the detainure of the child was at the desire of herself who was about six years old, and with the mother who lived separate from her husband. At chambers before Mr. Justice *Alston*—The father insisted upon the child's being delivered up to him or he would take her by force. The judge on this told him he would commit him. It appeared that the husband was become a bankrupt, and that the mother was forced to live separate from him on account of ill treatment: And that the child was likely to receive an improper education with her father, and was not well used.

Lord

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Lord *Mansfield*—The court, if the parties are agreed, will make no determination.

If the parties are disagreed, the court will do what shall appear best for the child; fix on a boarding school and the court will have no objection: Let the child in the mean time stay, so that the rule may be made with the concurrence of the family.

The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper, for such conduct as was suggested at the Judge's chambers, the court will not think it right that the child should be with him.

[749]
The power of the assigning the custody of a child brought before this court if the family disagree about the custody, and the child

be not of years of determining for itself is discretionary; if the father appear on circumstances improper to be permitted to take the child.

[It appeared to be held in a late remarkable cause of *Giffard* and *Giffard* before the Lord Chancellor, that the paternal authority as to its civil force was founded in nature, and the care presumed which he would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child's person, or if he would educate it in a manner forbidden by the laws of the state, the public right of the community to superintend the education of its members, and disallow what for its own security and welfare it should see good to disallow, went beyond the right and authority of the father.* And this perhaps, is the meaning of that passage in the famous epistle of *Brutus* to *Cicero*. “*Sed dominum ne parentem quidem majores nostri reluerant esse.*”

That the power of a father over a child, however despotic the law allowed it to be in other respects as to the child itself, was yet subordinate to the power and constitution of the state, so as not to justify any thing *contra rempublicam*.

Upon this construction, I think the argument drawn from this very passage to prove those epistles not genuine will have little weight.]

Dow on demise of Davy.

SECOND of November 1767, after several pecuniary legacies and real devises, the following residuary clause.

All

* Nullum jus privatum juri publico potest derogare.

All the rest and residue I give, devise, and bequeath to my brother *W. D.* his heirs, executors and assigns, according to the nature of their respective estates.

[750] Admittance in fee to a copyhold estate surrender, to the intents and purposes which he the said *W. D.* should by his last will and testament direct, limit and appoint. Admittance to a piece of waste, which he surrenders in the same manner.

Codicil attested by three witnesses.

Devise of annuity to *Mrs. C. D.* widow of his late brother, to commence from the legal day of payment after his decease.

House at *H.* and furniture. And I do ratify and confirm all the devises and bequests which I have made in my last will and testament, except what I have hereby altered; and I do direct that it may be annexed and taken as a codicil to my will. He had no copyhold lands at the making of the will, but had at the codicil.

Whether the copyholds pass?

It was argued, that if these had been purchased antecedently, no doubt the residuary devise would have passed them.

9 *Mod.* 96. A copyhold will pass under a devise of all the testator's real estate.

Whether the codicil meant real and personal estate, so as to pass these copyholds?

The execution of the codicil is a republication by reference, and operates as if he had made it a will of that date.

He confirms, and ratifies his former will in all respects not altered by the codicil, and he has not altered it with respect to the copyhold estates.

Cases to prove this not a revocation—*Heeling* and *Heeling*—The testator expresses a legacy given to the poor of *Rexham*.

The case of *Potter* and *Poster* was cited.

Codicil not dated, but it appeared to be four or five days before his death.

1 *Vez.* 438. and Sir *John Strange* quoted; this codicil amounts to a republication; the codicil being indorsed, and the attestation according to the statute. No precise form is necessary: But when he alters part and confirms the rest, this shall be good as to what he appears not to have changed his intent.

So Lord *Northington* appears to have held,

In the case of *Jackson and Hurlock*, in chancery there was a will. Marriage contended as a revocation. Codicil afterwards. [751]

The Chancellor decreed the codicil was a republication, and would pass after purchased lands.

The codicil here being made part of the will, the will is part of the codicil, and therefore sufficient to establish the relation.

The will is very shortly stated, only the residuary clause.

Lord *Mansfield*—Any thing particular in the surrender?

Nothing at all.

It was argued on the other hand, that the estate goes to the heir at law. If the devisor had no copyhold estate at the time, and could have none in contemplation therefore by the will when it was made, he could have no intention to pass any copyhold estate; after, he purchases and surrenders to such uses, intents and purposes as he shall limit and appoint, with a ratification of all devises and requests but what he shall alter.

It is contended that the estate passes in the codicil by reference to the will.

Your Lordship must be clear of the intent to pass them, and the legal manner of performing it.

Is this intent clear? *Den* on the demise of *Harris* against *Cutler*. Surrender to such uses as he should declare; determined that the lands will not pass. And in the case of *Heeling and Heeling*, the words being “declared, and to be declared,” your Lordship determined upon the word “declared” that the estate should go according to the devise already made.

Not a word of that kind here; or any words in a will, by which it appears the testator had an intention to pass copyhold lands.

The general devise of lands might have passed copyholds, with reference to the circumstances of his estate at the time of making the will; but at the time in this case he had none to pass.

As to the codicil, what is there that shows any design about devising the copyhold lands? He alters in some respects, and as to the rest ratifies and confirms; then he leaves his will as to the rest. He gives it no new effect, it stands as it did before; and can pass no copyhold lands, because they did not pass then. And he has not expressed any intent

[752] intent that any thing should pass which could not when the will was made, but the contrary.

There is nothing, then, that takes from the heir at law.

Lord *Mansfield*—Did you look into the case of *Atcherley* and *Vernon*? 1 P. W. 703.

“ I ratify and confirm my will, except in alterations.” This was held a republication.

Lord *Mansfield*—This is a republication by the statute. The codicil being subscribed by three witnesses that case is decisive: And the will spoke by the republication as if it spoke at the date of the codicil. No doubt but the copyhold lands will pass.

Mr. Justice *Ashen* cited *Cumm.* 383.

Superfedeas.

ON a motion to set aside a writ of possession, and *per facias* executed, pending a writ of error. The writ is no *superfedeas*, unless bail be put in within four days.

Felony.

WHERE the party escapes into another county, and the goods are found, the justices of the county where the goods are found may commit in order to trial in the county where the goods were found.

Vide 24 G. 2. c. 55. And vide 13 G. 3. c. 31. s. 4.

Vide 2 & 3 Ed. 6. c. 24.

Lord *Mansfield* observed, if a capital offence is committed in the colonies, Ireland, or Scotland, the court will send them back, and not suffer them to be tried here. And his Lordship said there was a case in *Strange*, meaning, I suppose the case 1 Str. 846. *M.* 12 G. *Shelling v. Farmer* for seizing an house in the East Indies, which it was held, being local, could not be tried here.

[753]

Smith's Case.

Smith v. Dennis, or Dennison.

ACTION for money had and received. Special verdict found at the assizes, stating that the defendant is post-master of the town of Hungerford, and that the plaintiff

plaintiff is a resident in the said town. And that in the said town there has been a post-office for the conveyance of letters ever since and long before the statute of Queen Anne. And that the residents in the said town paid for the delivery of letters at their houses a penny, over and above the rate of postage, for each letter so delivered. And that this had been paid by all the inhabitants of the town, except one family, who refused to pay, and, after five years refusal, had the letters delivered without payment of the said additional penny. And the jury find that the said penny, over and above the rate of postage, used not formerly to be paid, but the letters were delivered gratis. And that the said demand of an additional penny was introduced on a change of post-masters.

And that the plaintiff had a letter delivered at his house, and the additional penny, as aforesaid demanded by the defendant, over and above the rate of postage, which he refused to pay; whereupon the defendant refused to deliver the letter, until the plaintiff should have paid the said penny, which the said plaintiff did afterwards, upon the defendant's said demand. And that the same is the money for which the action is brought.

And the jury farther find, that the defendant deserved the said penny, as a reasonable recompense for the delivery of the said letter, unless he were bound to deliver the same to the plaintiff, so resident in Hungerford, at his house within the said town of Hungerford, gratis. But whether he were bound so as above by the plaintiff in his plea alleged they submit to the court, and conclude in the usual form.

The statutes relative to the post-office were cited, which are principally 12 Car. 2. c. 35, anno 1660, the original act, but repealed by 9 Anne, c. 10. which is that statute upon which the case principally turns, and 3 G. 1. c. 7. making the said statute of Queen Anne perpetual, and part of a general fund; and 4 G. 2. c. 33. which was relied upon greatly in this cause.

Objected against the demand, that within the town the post-master ought to deliver gratis; and there will be no objection resulting from the extent of the town, for the larger it is the more letters will probably arrive, the revenue will encrease, and with it the profits of the post-master.

Argued for the plaintiff—This is a question whether the post-master is bound to deliver letters to the inhabitants
of

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of a post-town resident in the town, without any recompence.

This question must be determined by a view of the acts of parliament relative to the subject taken together. §

Letters ought certainly not to be detained till the fee is paid.

The provisions concerning the penny post-office illustrate the question.

* 4 Bur. 1.
Hill. 8. G.
3. p. 2149.
Postmaster
cannot de-
tain a letter
on demand
of any thing

The post-master does what in *Barnes's* case* it is expressly decided they cannot do. He was bound to deliver the letter according to the direction, and could not retain it, insisting upon a fee.
for the delivery of the same beyond the act of parliament.

Lord *Mansfield* said to the counsel on the other side what do you think of the judgment of the Common Pleas in *Browning and Goodchild*, upon the general question? Surely it was decisive. But if the parties are dissatisfied I will not exclude them.

The post-
town is the
limit of
delivery
gratis.

The town or place is the word used; the town is taken as the place of delivery, where there is a town.

If the great case is right it is decisive; for this was within the town.

And he demands it as a duty; which in *Barnes's* case it was determined he could not do: No man can demand a duty without an act of parliament.

Mr. Justice *Ashton*—That within the post-town the post-master must deliver: For that otherwise there would be no limits; he might refuse at the next house. The inconvenience would be great to all; and I cannot discover the reason.

Mr. Justice *Willes*—That the court hitherto had avoided determining upon the general question: But that, now it came before them, he could not forbear saying there was no doubt upon that, and concurred with his brethren.

JUDGMENT for the PLAINTIFF.

[755] Note, The case of *Browning and Goodchild* was in Trinity term, 13 G. 3.

Stock and Harris was also mentioned, which, it seems by *James Barrow's* note, was decided on the special usage of the place rather than on the general rule, which appears to have

§ Quæ in pari materia sunt conjunctim operantur.

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have been now first settled in this court, conformably to the opinion in the Common Pleas.

Harrington's Case.

THREE bonds upon a gaming contract, payable at different dates, with warrant of attorney to confess a judgment.

The obligee, to whom these bonds were given, put them into Mrs. *Harrington's* hand, without notice of the illegal consideration for which they were given, and without its appearing she was any way privy to the said illegal contract. Whereupon she swears, in her affidavit, that she wrote to the defendant, the obligor, to know whether it was agreeable to him she should accept the said bonds, and, receiving no answer, took out execution upon the same.

And now, a motion being made to set aside judgment and execution, and that the bonds might be delivered to the defendant, as being void by the statute of *Queen Anne*.

Lord *Mansfield*—It is true this has been decided on the ground of a negotiable bill.

It is very severe: And I don't know whether it does not do more harm to an innocent person than good against gaming. But so it has been decided: And if you came in the formal way we would not alter.

without privity, void, tho' for a bona fide debt.

But when you come for a favour, we will not grant it against an innocent person; and if she wrote that letter she is innocent.

[Of games and penalties 12 R. 2. c. 6. anno 1388. 11 H. 4. c. 4. 17 E. 4. c. 3.

33 H. 8. c. 9. anno 1541. 2 & 3 P. & M. c. 9. 16 Car. 2. c. 7. 9. Anne, c. 14. 2 G. 2. c. 28. f. 9. 12 G. 2. c. 28. 13 G. 2. c. 19. f. 3. 18 G. 2. c. 34. 25 G. 2. c. 36. 30 G. 2. c. 24. f. 14.]

Clarke against Johnson and Co.

[756]

THIS was upon an action of *assumpsit* for money had and received, brought by the plaintiff, a brewer, to recover a sum of money, against the defendant, keeper of a lottery office, upon the following case, which was settled before his Lordship at Guildhall, by counsel on both sides, a verdict being found for the plaintiff, under his Lordship's directions, for 459 pounds four shillings and four pence.

CASE.

C A S E.

“ J. W. being a clerk to the plaintiff, a brewer, and receiving money from the plaintiff’s customers to his use, and also negotiable notes, in the ordinary course of the plaintiff’s trade, for the use of the plaintiff, paid several sums, (ascertained in the verdict) and amounting in the whole to 459l. 4s. 4d. to the defendant, upon chances of the coming up of tickets in the state lottery of the year 1772, contrary to the act of parliament of the said year. The plaintiff has given a release to his clerk, and to the sureties of the clerk, for the said money, no part of which has come to the plaintiff’s use, but the same is detained by the defendant, and not returned upon demand.”

The question is, 1st, Whether the plaintiff had a right to recover?

2dly, Whether the witness is admissible?

It was contended that, to justify against the plaintiff, in an action for money had and received, upon an implied contract to return, you must shew the money was the plaintiff’s property, and that it came into the hands of the defendant, by a good right; and that he has a better title to keep it than the plaintiff has to take it back.

12 G. 3.

Contract upon the chance of tickets coming up declared null and void.

That the defendant had it by no title.

He had it expressly against the law, which forbade to receive the money, and expressly punished by penalty.

[757] The defendant’s claim can’t well hold.

The plaintiff’s claim against them is a fair and honest claim, and he has a right to hold.

As to the witness.

An objection to credit to be left to a jury.

The plaintiff’s calling of him was necessary: And he had a right to call him, as bankers their clerks, to prove a mistake in payment, though the clerk responsible.

Qui tam, informer against *Ellison*.

As to the objection that this witness is not admissible, because *particeps criminis*, in some cases *participes criminis* are admissible.

A man may shew his own turpitude. *Tomkins and Barnett*.

Besides, the defendants have performed their agreement: they insured upon chances of coming up; the object of the insurance is complete, and for ever done with.

Lord

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Lord Mansfield—That case of *Tomkins and Barnett* has been a thousand times denied.

Mr. Buller—A man insures a ship, and, supposing it to be lost, pays. The ship not lost; he shall recover upon an *assumpsit*. But if a man give money to bribe, and the agent bribes, he shall not recover: For he gave it for an illegal purpose; he parted with it. *Volenti non fit injuria. Ex maleficio non oritur contractus*. If any case they should have had *traver* upon tort; for there was no contract to ground an *assumpsit*.

Lord Mansfield—There was a case where the person who had taken the oath against bribery was called to prove the bribe.

This is an action to recover 45*l.* 4*s.* 4*d.* upon *assumpsit*. J. W. clerk to his master, received cash and negotiable bills to his master's use, and, without the knowledge of his master, laid them out in lottery tickets.

The act prohibits the thing, inflicts a penalty for the doing of it, and declares all acts to the contrary null and void.

The jury find a verdict subject to the opinion of the court [758] whether W. was admissible.

He was released both by his master and his sureties.

But at large the general question is, Whether the plaintiff can recover upon this evidence, or upon any in this case?

I know no rule that a man who says something that is not proper of himself, is not to be heard where he goes to prove any material turpitude in another. The rule *non est audiendus* is, the jury will not credit him easily: There can be no stronger case than the man who had taken the oath against bribery admitted to swear the bribe he had sworn against.

This is in the nature of *conditio indebiti*, where you come to recover what in conscience ought not to be kept from you. It is an action in the nature of a bill in equity.

Nor is the rule of *particeps* as Mr. Buller states it.

There are two sorts of rules calculated to defeat fraud, one to protect good and innocent people, by rescinding a fraudulent agreement, into which they are drawn; the other to prevent persons dealing upon equal terms from falling into agreements prohibited, by preventing such persons from taking relief against such contracts.

Two rules against fraud, one applied to protect innocent people; the other to

prohibit those who have acted on equal terms, mutually against a prohibition juris positivi, from proving an offence with which they are equally chargeable, and take benefit, against their own crime.

In the one case there is an indiscretion; and as we don't apply the idea of abstract absolute goodness to cases of this nature, which will not bear it, there is a fault. But you don't apply

apply the rule of *pariceps criminis non est audiendus*, but in *pari delicto patior est conditio defendentis*. The crimes are not equal. Shall the judges not enforce and execute the act? The act was meant to protect incautious people. The case of *Tombles* and *Barnet*, to be sure, is a precedent. I won't say that the argument is weak, but it is not very strong; for it's saying that a person who avails himself of the necessities of a man to take 10,000l and the innocent person are in the same condition. And where it is not *par delictum*, the person comparatively innocent shall not, for his fault or indiscretion, be made a screen to cover the guilty, nor be deprived of redress.

The case of *Bosanquet* and *Dashwood* is extremely strong. Lord *Hardwicke* is reported to have declared that to say the crimes were equal would be to say that the cheator and cheated were the same.

[759]

But where it is *pari gradus* the defendant hath the better side. And in this case if the clerk had

In the case of a breach of a positive statute, made for political reasons, no body is drawn in to insure. The shops are open; the offence equal: And at first it struck me that the plaintiff came in the case of his servant, could not recover. But thinking of it that night and next morning I altered my opinion very greatly. And we have talked together upon it since.

sued for himself he could not have recovered.

Where the lawful property may be ascertained the owner shall come and recover, tho' the thing has been unlawfully changed.

Vide supra.

Whoever enters into an illegal contract takes the benefit of it, subject to all rights known or unknown at the time, which are against the contract.

Now whenever money, or any thing that can be ascertained, passes without consideration, the plaintiff, the true owner, comes in his own right, no matter whether it be paper or cash, provided it be ascertained. And in this case notes were more easily ascertained than the bank-note the highwayman had put off at Hatfield, and the post-boy changed it.

You remember the case of *Reynolds* and *Golightly*, where the money was traced through several hands. In all these cases the original owner may come as plaintiff, and say, "You came improperly by it; you have no right; you cannot retain it against me, who have the right."

I think this decision may be of great service to the public. It may be somewhat difficult to trace, but wherever it can be traced it shall be recovered. In prohibited contracts, illegal contracts without consideration, you take the money, if it be the money of the master, subject to his right to recover it when it shall be ascertained. And I think this contract was null; the property always continued, and he ought to recover.

Judgment accordingly.

The

The King *against* Williams.

THIS cause came on first at Guildhall, at the sittings for London, on the ninth of July, 1774, before Lord *Mansfield*.

Information against *John Williams*, publisher of the *Morning-Post*.

Setting forth that he published a wicked and seditious libel in the *Morning-Post*, 15 —, 1774: “Let the world know that Lady — (with the name at full length) is far gone with child by her hopeful nephew.”

Argued for the prosecution.

Mr. Serjeant *Glyn*—Though a libel may be one though [760] it be true, yet, I think, it cannot be the more innocent and less malignant for being false. This seems so false, that I believe there is not a man in the kingdom who believes it, or thinks there is the least ground to believe the suggestion.

Whenever I read a paper of this nature (for so malignant a one I never yet read) it always occurs to me, and I hope it will to you, that the author must be some enemy of the liberty of the press: For no man can read such papers without doubting whether the press does not do more harm than good; and whoever gives cause to those doubts is its worst enemy.

And if some means be not found for restraining the excess of such privilege within the bounds of decency and justice, its most zealous friends, as I said, must begin to doubt whether it does not do more harm than good: And our property, with all our valuable connections, will be without protection. The case is before you, and I dare say you will think the prosecutor has done a duty highly incumbent on him. And if you believe this paper to be a libel, and the evidence which charges it, you will inflict that punishment by your verdict which justice requires.

Paper proved to have been bought at the shop of Mr. *Williams*, and the duty paid by Mr. *Williams*.

Lord *Mansfield* observed they had a right to read the whole if they pleased, because it might explain.

It appeared in evidence the defendant received a yearly stipend of sixty guineas, as publisher of this paper, from the editors.

Counsel for the defendant Mr. *St. John*—I believe the noble Lord on the bench will support me in saying that when the defendant calls witnesses, to take off the presumption which at first arises, the effect will be, if his testimony is credited, that the guilt imputed to him is removed by the taking away of this presumption, which in some degree stands against every man charged with an offence.

In this case, as they were obliged to give some evidence in support of the charge, they called a person who proves he bought the paper of Mr. *Williams*, which is a ground of presumption to affect Mr. *Williams* as the publisher till we prove the contrary.

[761] If we prove Mr. *Williams* is not the author, is not the printer, is not the editor of this paper, is only the agent, and sells them at his shop, at the same price as the original editors; if a paper of this sort has been left at his shop before he was up, and without his knowledge of the contents, and he, as soon as he comes down, on looking into the contents, expresses the greatest concern and indignation that such a libel had been sold, sends back all the papers in his shop unsold, not even lends one to a friend, but refuses this, though particularly requested, you will clear him of the intention, and consequently of the guilt and punishment.

The law as soon as the fact is fixed infers the guilt, and leaves the defendant to shake the presumption off by evidence. In the case of murder, a man is killed, and found to have been killed by the defendant: The law will never presume one man killed another innocently, in time of peace and without legal authority from justice; but it puts him on his defence, and he may prove that he did it necessarily, for the protection of his own life; or that he did it accidentally without malice or wilful negligence. And in either case he will be acquitted.

So far from malice to any character aspersed in this paper, he shews a just and honourable resentment at the malice of another; so far from negligence, from the moment he knows the contents, and on the very morning the papers came to him, he does every thing in his power to suppress the publication.

Mr. Serjeant *Glynn*, in reply—Gentlemen of the jury, that Mr. *Williams* is not the printer, Mr. *Williams* is not the proprietor, may be facts, certainly true and consistent with the charge before you. It is not a question whether the evidence is insufficient to prove him a publisher; or whether

ther there has been sufficient to repel the presumption at first arising. As the publisher he stands forth; as the publisher only he is charged. They are sold at *Williams's*; they are also sold at two coffee-houses; and also at the editor's.

For sixty guineas annuity Mr. *Williams*, then, is content to take the chance of publishing what was given him to publish.

The author is mentioned—who is the author? The printer—who is the printer? Who, then, brings all this mischief to light? *J. Williams* alone. The mischief, however, is not extensive: If some have got abroad the defendant cannot help it. They are all sold early in the morning: * This I believe. And this order of not publishing might have been repeated by *Williams* at nine in the morning without harm to the sale daily. And indeed if in this instance any part of the sale was stopped, Mr. *Williams* suffers nothing by the sale stopped, for he has a certain stipend. The proprietors are no sufferers, for they have sold a sufficient quantity. The mischief is not stopped, for the publication is complete in the morning, and no body who thinks but is apt to believe, when he has once read such a paper, that he has read it once too much. A paper of such a sort is seldom looked into a second time, any more than a second day.

* Five o'clock in the morning they supply the coffee-houses, as a witness for the defendant said.

[762]

This is, therefore, just the case of the common publication of a libel.

Lord *Mansfield*—Gentlemen of the jury, this is an information against the defendant for publishing a libel, set out by the information.

That it was published is not disputed; that it was a very grievous and infamous libel is not disputed.

That the meaning is clear is not disputed.

But it is said the publisher did not know what it was, and stopped it when he did. This is set up as a justification if any thing; for nothing in mitigation comes before you; that arises in judgment.

There are a thousand things might have been a justification, but this is not one of them.

Williams is the ostensible publisher; the author does not appear; the printer does not appear. At five in the morning it's published; at nine Mr. *Williams* comes down; he did not read it: I dare say they never read a thousandth part of what they publish. Are they, therefore, to justify

their publications, be they what they will, because they publish they know not what?

If his sorrow was honest and sincere it may go very far in mitigation. There is no certain punishment affixed; it depends upon the circumstances and malice of the criminal; but it can be no legal justification. If you are satisfied with the evidence that he was the publisher you will find him guilty; if otherwise you will acquit him.

Jury, without going out, found the defendant guilty.

And now, in this present term, 22d of September, 1774, judgment of the court was prayed.

[763] In mitigation it was offered by his counsel, that he is not publisher, but takes a stated salary of 60l. that he always used to inspect the papers at five in the morning, but was, unfortunately, later that morning. That on reading he discovered and was much hurt with the contents; that he immediately forbade the sale, and refused to let any body see it. That he detests the publication; that he knew not till nine on that morning of the publication that there was such an one in that or any other paper in the world. That he delivers it out, and is not the only publisher, for that they are delivered at the printer's.

On the other side—That he took the salary from the publishers; that he must take it subject to all the risque and all the consequences: And that inspection came too late for an excuse, when he had let the papers go out of his shop. That if he was unfortunately so late upon that particular morning he would have an opportunity now of profiting by the judgment of the court, and either lie in bed quietly, without being concerned as an agent for newspapers, or else take care at least to publish nothing for the future without reflecting, that if he chose to suffer a publication to be made through his hands, he must see that it was innocent, or abide the event of its being otherwise at his peril.

Mr. Justice *Ash* delivered the judgment of the court. You stand convicted of a scandalous libel, charging a gentleman and a lady with a very atrocious crime; without ground, and, as you acknowledge in your own belief, unjustly.

I am not at all clearly satisfied that a number of people, with a doctor of divinity at the head of them, are authorized to publish such writings, by hiring a person to stand out for them.

The liberty of the press is a very great advantage and security to our public liberty: But it is frequently abused

to the purpose of the most injurious attacks upon private liberty and tranquillity.

It is not sufficient that a man rises later than his usual time, sees a pernicious publication has gone out of his shop by the hand of his servants, acting in the course of sale under his authority, and then endeavours to stop the rest. However, though it does not justify, yet, as it appears you were sorry when you found it was published, and ordered no more should be sold, and refused to suffer it to be read, on this consideration the court mitigates the fine. But, in order to example, and to restrain such licentious attacks upon characters, and to prevent the general mischief, the judgment of the court is, that you pay a fine of 100*l.* and be imprisoned for one calendar month, and until the said fine be paid.

Goodright, on Demise of Carter, *v.* Straphan and others.

THIS was before his Lordship at the sittings after Trinity term last at Guildhall, and now came before this court on a motion for a new trial, which the court took time to consider upon suggestion of the counsel who attended.

Ejectment as widow of one *Carter*, title from one *Roberts*, [764] 1710. Plaintiff had been in possession: To prevent bar from length of time they offered evidence of a variety of acts to prove that the possession of the plaintiff was a special qualified possession, as receiver under the defendant's title.

On the other side—That by indenture between *Carter*, and his wife on the one part, and *Greeney* on the other, reciting that *E. Carter*, from and after the decease of *Mary Trevor*, widow and relict of *Roberts*, was, under the will of *Roberts*, entitled to a messuage on Thames wharf, in the city of London, and also to three messuages in Reading, and truly indebted to *Greeney* in a sum. And *Greeney* had farther agreed to supply 144*l.* for the support, subsistence, supply, and maintenance of them and their family so long as *Mary Trevor* should live. They grant for a term of ninety-nine years the house and premises at Reading to *Greeney*, his heirs and assigns. Covenant by the husband, that he will pay the sums mentioned, principal and interest, and that until such payment it shall and may be lawful to and for the said *W. Greeney*, his heirs and assigns, to have, hold and

and enjoy, and to receive the rents and profits thereof, for the term of ninety-nine years after the death of *Mary Trevor*.

After the death of the husband *Mrs. Carter* gives a receipt.

“ 24th of June, 1760, from 1755, cash received from
“ *H. and T.* estates, deducting taxes and repairs—125l.
“ from the Reading—due to me, 79l.”

She afterwards gives an order to her tenant to attorn to *Saunders and S.* executors of *Greeney*, the mortgagee of the premises, who had not before possession of the houses in Reading; and to pay rent.

She surrenders possession of an house to the executor of *Greeney* by indenture, and she calls him mortgagee thereof.

Lord *Mansfield*—This was contended as very satisfactory evidence of an acceptance of *Greeney* as tenant during the term.

On the conscience and right of the case it struck me very strongly. To be sure no woman can join with her husband in a deed without a fine; but no man who can persuade his wife to join in a deed, would not persuade her to join in a fine, therefore it is mere form, and the defect of form she may supply by her acquiescence and actual acceptance when in her own power.*

[765] The money borrowed and lent for the support supply and maintenance of them and their family; and lent with a very kind intention.

I thought it very much against conscience that she should take the benefit and avoid the charge.

I am extremely glad it has been moved. I think it very candid the counsel should advise a motion upon the verdict, rather than a new ejectment.

When this came first before me, Mr. *Wallace* argued upon the authority of leases whether with or without rent, that by action of waste in one case, and acceptance of rent in the other, she may confirm a lease which she might have disallowed?

It is said that these cases are exceptions to the general rule, which says, that the deeds of a woman are not voidable but void; and that thus, though a great many years ago, the court would have said they could look no farther, they should

now

* Licet dispositio de interesse futuro plerumque sit inutilis, tamen fieri potest.

Declaratio præcedens quæ sortiatur effectum interveniente novo actu.

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now see the substance, it is not a lease but a mortgage. It was for the advantage of agriculture, and benefit of tenants, that the leases were allowed. 'This distinction we think true: * Vide the case of Tracey Atkins, in Sir James Burrow.

That the woman should only set aside leases when disadvantageous to her; and that we are to look with the same eyes upon this as other cases, and see into the substantial* nature.

What then is this case in substance and real justice? And what is it with reference to law and authorities?

Perk. 154. "If a femme deliver to me a deed as her deed
" it is void, and if her husband afterwards die and she deliver the same deed, then it is good."

Are then the acts here amounting to a delivery? I think we have authority they are: *Co. Litt.* that a deed may be delivered by words without actual delivery.*

Roll's Abr. If a femme covert execute a deed with her husband, and after the death of her husband he delivers this deed, it is good.

What then is the case?

The defendant is in possession of the mortgage, she declares her surrender, she accounts to him as mortgage; the act with respect to the possession of the house at Reading, is a confirmation of the deed as to that; and a confirmation of part is a confirmation of the whole. We think therefore, there are grounds enough upon this case to say, that the deed is ratified and confirmed by the wife after the death of the husband; not upon the distinction of leases, but upon the delivery of the deed. [766]

Taylor against Fisher and Others.

LORD Mansfield reported the case.—Ejectment of an undivided moiety claimed under the will of one *Perkins*, he gives to each of his two daughters the undivided moiety—to them and their children of their bodies begotten or lawfully to be begotten; and if either sold her share, the other was to have the moiety, nothing turns upon that; after this there was a deed of partition 1705, by which *F. T.* agreed to hold during the life of *M. T.* and *E. S.* *M. T.* died some years before *E. S.* and he in 1734. *F. T.* held over, under whom the plaintiff now claimed as being entitled from the length of time to presume an actual ouster.

From 1734, this estate had been held solely without any claim by *M. T.* or any claiming under her.

In 12 or 14 the estate at *Tottenham* came into other hands. I left it to the jury that they might presume actual ouster upon the circumstances.

Argued

Argued for the plaintiff—These parties were tenants in common without an estate, the others were joint-tenants. And upon forty years possession the jury did right to presume an actual ouster. There is no need to state cases of presumption from length of time surrender on a lease, livery and seisin.

In this case of tenancy in common possession is no bar for the limitation to run upon without actual ouster ; but it is good to leave to a jury as presumptive evidence.

Epfon against *Shackleton*, Yorkshire assizes.

It was contended there, that being an estate where the defendant was entitled to the whole, the evidence of an adverse possession by receipt of rents and profits of a moiety was not sufficient, when the father had been admitted and his ancestor to another moiety. And Mr. Justice *Blackstone* said, that the statute of *Queen Anne*, in case of freehold, was a material circumstance in the case, and length of time a possession for forty years. I am persuaded the court will
[767] be of opinion, presumption of ouster was well warranted in this case.

Will made 1690, agreement 1705, to take during the life of *H.* surrender about thirty-four.

That there was no perception of profits during forty years.

Tenants in common are as if seized of several estates as to this consideration.

It is argued that the one of two daughters held possession fifty years, and contended that the daughters were tenants in common, and therefore the possession of one is the possession of the other ; but this does not hold against the statute of limitations.

Lord *Holt* says, forty years receiving rent, with no demand, seems very strong.

Mr. *Dunning* on the other side—There is no distinction I think can be made, to take this out of the general rule. I think the possession of one tenant in common is the possession of the other.

The party in question being under age and a minor, she could not in 1715 do any act to the prejudice of the estate.

The law does not say the possession of one shall be that of the other for a limited time, but to the end of the world if necessary.

There is here no adverse possession from 29 at least, if not 21.

How can a copyhold differ from a freehold ? The copyholder admitted only to a moiety, this proves his title. The defendant was only entitled to a moiety, which in the year

1734 is shewn to have been in him, and the other moiety in my client.

An unlawful and tortious act as in this case of one tenant against another, cannot be presumed forty years after his death.

If your lordship be still of opinion, the jury, who exercised no judgment, did right in finding by presumption an actual ouster, and that it can be presumed, and that there were circumstances to presume it, then the finding is right. But, with all possible deference, I must say the jury were misdirected.

This is my opinion; and if your lordship upon consider- [768]
ation should be of that opinion, I should pay your lordship a very ill compliment, in supposing you would not be as ready to decide on that side as on the contrary.

Reeding and Royley Salk. 423. Limitation never runs against a man but where he is actually ousted or disseized; and therefore a tenant in common may disseize a man: it must be actual ouster and not perception of profits.

Lord *Mansfield*—It is most certainly true, that I told the jury they were warranted to presume an adverse possession and ouster of the other tenant in common. Some ambiguity arises from the term of actual ouster, as if pushing him by the shoulder was necessary.

The single act of holding over a length of time can give him no title; but tenant *pur autre vie* holding for twenty years after the death of *cestuy que vie*, is a bar. Tenant in common holding *eo nomine* can never bar, because he holds only in support of his right. If he acknowledges the other party as tenant, and says he will pay him the money, there is no adverse possession; nor is saying he will not pay him at the time without denying the title: But where he denies the title and keeps possession against it, there is an adverse possession and ouster. Has he held in this case by adverse possession? The possession has run numberless years.

Actual ouster does not mean putting out by force of hand proved in evidence; but holding over by such possession as must have been adverse to the tenancy, is full presumptive evidence of actual ouster.

I continue of the same opinion as I was at the trial.

Mr. Justice *Aylon*—There have been various opinions what shall be an actual ouster; and what possession shall be the possession of one tenant in common for another: I think it is while he takes the profits as tenant in common. The difficulty arises from there being a time in which there certainly was a tenancy in common. What is the bar? A forty years possession; and very rightly, for otherwise nothing would be a bar.

That the forty years possession on the circumstances of this case was a bar.

This is not a bare presumption, I think, but an actual bar.

I think

I think that the evidence is proper to be left to a jury; and there is not a tittle of evidence to find a tenancy in common for forty years back.

Mr. Justice *Willes*—This case must be determined upon its own circumstances. If there was a right it was at the time of the death of *T. S.* and if for thirty six years there has been no claim, how dangerous, after so long quiet enjoyment, to receive a claim.

[769] Whatever the old ideas might be of an actual ouster, I think adverse possession is now actual ouster. And the idea not to be extended since the statute of *Queen Anne*, which has changed the remedy, and does not require actual entry to give remedy.

Force of the statute of *Queen Anne* as to what shall be actual.

Thirty six years possession, evidence of agreement dissolving the tenancy.

I take adverse possession for thirty-six years without actual ouster, in the strict antient sense of an agreement which dissolved the tenancy in common.

That such possession was ground of any presumption against the defendant's title.

Mr. Justice *Asbhurst*—Here is a possession of forty years without any rent or profits taken, I think that this was good ground for a jury to presume any thing to destroy the defendant's title. They might either presume an actual ouster, or, if necessary, a conveyance. In the *Yorkshire* case, it is not necessary for me to speak what would have been my opinion. It did not come properly before the court. It was whether the plaintiff was barred by the statute of limitations. The court were not to presume, the jury were to presume. And I think they did very right in this case, to presume every thing which might destroy the plaintiff's title.

Witnesses.

IF you come to enlarge trial for want of witnesses on your side, you should be ready to admit all necessary facts, which are of a nature to be proved without witnesses on theirs.

You must shew clearly the want of material witnesses has not been contrived and thought of, as an argument to put off the trial. If they might have applied earlier, or there be any apprehension the objection has arisen just time enough to avoid the trial, it will be refused. And so, wherever this want of evidence might have been discovered, and application made for the relief of it originally, and this has not been done, it may expect from the practice and justice of the court to be refused.

Jones *against* Cowper.

GOODS sold in consideration that *A.* by parol promised *B.* the vendor, that if *C.* the vendee did not pay for the goods he would pay for them. The goods are delivered by *B.* to *C.* accordingly, and *B.* sues *A.* for the money.

Contended that this not being a promise in writing, was [770] by the statute 29 *Car.* 2. not binding, for that the said statute *c.* 3. *sec.* 4. in the second clause says—that no action shall be brought to charge any defendant upon any special promise, to answer for the debt of another, unless the agreement upon which the said action is brought, or some memorandum or note thereof shall be in writing.

To this it was answered, that the statute meant where the promise to be answerable for the debt of another, was not the original promise upon which credit was given; but that here the original credit was given to the defendant, who, before the goods were sold promised to pay on failure of payment of the vendee, upon the credit of which promise of the defendant's the goods were sold; and therefore that this action was well brought.

Case, *Hil.* 1773, at the sittings of *nisi prius* K. B. *Mawbridge* and *Cunningham*, where the goods were delivered in consequence of a promise made to be answerable for another; this promise was held to bind the defendant in law.

Mr. Dunning—There the party undertaking was alone liable originally, and not the party to whom the goods were delivered.

But here, laying the statute of frauds out of the case, you should have proved, that you had first applied to the vendee and could not get your money of him; for he was first liable. I do not know what can be a collateral or conditional engagement if this be not; and you have not shewn that the condition was become absolute in your favour by default of payment from the original debtor the vendee.

Lord Mansfield—There is a clear distinction between an undertaking for another, before a debt contracted and a promise afterwards.

Undertaking before delivery, “you may trust to me or I will see you paid;” there the party who undertakes becomes the debtor.

But where the undertaking is before the goods are delivered in case he does not pay I will pay you, there is a nicety; and I would not decide without looking into the cases. But
what

what Mr. *Dunning* says is decisive, as to the case now before the court.

The promise is conditional, and they have not shewn they used due diligence to have the debt from the person first liable.

[771]

Gilbert *against* Berkinshaw.

ACTION against the defendant for maliciously indicting the plaintiff for perjury.

Second and third count for defaming the plaintiff, and saying of him—he is a scoundrel and I will prove it.

It was left to the jury that if there appeared a probable cause, the action would not lie.

The plaintiff was an attorney.

The jury found for the plaintiff (who had laid his damages at 5000*l.*) 400*l.* The plaintiff took the verdict upon the second and third count.

A new trial was moved upon the ground that the damages were excessive.

And also that the verdict was against evidence, and against the directions of the judge, for that there was a probable cause.

The judge on the report of the case said, he thought there was evidence of the malice, because the defendant said “I will attack him again.”

Argued against the rule—that the court will not set aside a verdict because of excessive damages. Where they have set aside a verdict in which the damages may have appeared excessive, it has been for mal-practices, and not for the largeness of damages fairly obtained.

Stiles 166. where 1500*l.* was given.

1 *Lev.* 9. That the ground of the decision in *Stiles* was not the largeness of the damages, but ill management with the witnesses.

The court cannot measure the ground on which the jury find damages that may be thought large; they may find upon facts within their own knowledge: And in order to enable them to this, it was that the old common law writ appointed them to be *de vicinet*.

Twelve jurors are not to be supposed to give a verdict contrary to their conscience; and both parties put themselves upon the jury to abide their decision, as to the quantity of the damages, as well as whether any or not.

A man's

A man's reputation is hurt, and that very easily, be it [772
ever so sound; his character in his profession, which concerns him highly, both with regard to his good name and comfort, and to his means of subsistence, is injured—no man can say how far: Nor can any man estimate the sensibility of the person injured, and reduce the compensation to a strict sum, not to be exceeded, in pounds, shillings and pence, let twelve honest men think of it as they may.

Second—Whether this were a malicious prosecution without foundation, the jury were competent judges, and have found that it was; and malice needs not be expressed but may be implied from circumstances. The declaration after verdict that he would attack him again seems evidence of malice, and of a design to ruin him in his profession.

Wilford and *Berkeley*, the damages were extremely high; but the court would not interfere.

The person who brought this indictment to trial had heard all the evidence against the plaintiff upon a former cause; in which the plaintiff in this cause was defendant, and knew that it was so insufficient as to end in a non-suit, and yet has harassed the plaintiff with an indictment.

Shall there be a right without a remedy? Shall the party who comes here for a new trial have pursued malevolently and in an illegal manner, and not satisfy in the manner which the law requires in damages?

To send it down to a new trial will reprobate, in the circumstances of this case, the decision of the jury, and will be telling whatever jury shall try it again, that the plaintiff's reputation is not worth any damages in the least considerable; or it may be thought to signify to them, that they should find no damages at all.

On the other side—That the jury will not take it as a reflection upon their verdict since they had evidence, which if they could have read it upon the trial, might have made it unnecessary to come for a new trial.

That with a proper assignment the indictment might have been supported; and that it had never been decided upon the merits.

That as to damages for the injury done the plaintiff in his profession these were out of the action; for the declaration stated no special damages, and if the jury took any into consideration they went out of the action, and did that which would vitiate their verdict, and make it void throughout.

[773] The jury therefore, it is submitted, were mistaken; the damages much too great; and the verdict ill founded: And therefore that a new trial ought to be granted.

If want of instructions to counsel is objected, it was the defendant's choice, who thought it the right of an Englishman to plead his own cause. And what counsel could have induced the court or jury to form a different opinion upon the case, than that which the jury formed, and which the judge who tried reports they had ground to form?

In reply to this Mr. *Lad* said—that the defendant had relied upon his innocence, and therefore chose to speak for himself; that as to the indictment of perjury there had been an acquittal by mistake, but no trial upon the merits.

Mr. Justice *Willes*—I would not interrupt Mr. *Lad* while he was speaking, but I think I am called upon personally: I tried the cause; and the acquittal was certainly upon the merits.

The perjury assigned turned out to be a mere surprize. In examination he immediately recollected and corrected himself consistently with his former evidence; his behaviour was thought to be extremely candid, and acknowledged as such. And the counsel on the other side, upon this evidence, and other witnesses concurring with it, not having any thing to oppose, his client was nonsuited.

Upon the indictment for perjury, five of the witnesses called said they did not hear him correct himself, others said they did. I directed the jury upon the general appearance of the question, that it appeared the now plaintiff had given his evidence fairly: I did not direct the jury to find him perjured.

I told them, the parties, they were gentlemen of the same profession, and wished the matter was dropt, and hoped to think both mistaken.

I thought he would carry no great damages, by carrying his cause down to trial.

Lord *Mansfield*—This rule to shew cause why there should not be a new trial, comes before the court singly on the judge's report.

Not on the ground of surprize, material evidence since discovered, or mistake in the jury.

[774] Verdict taken upon two counts, one of which is, for saying of the plaintiff, "He is a scoundrel, and I will prove it;" the other count also charges words of defamation.

The

The only ground is of excessive damages: And though I would be very sorry to lay down a rule that no new trial would ever be granted on account of excessive damages, where they might be so enormous that it would appear their minds must have been unjustly and unreasonably heated, or otherwise under a corrupt influence, or have taken in something by mistake to the damages which by law they could not; yet I do not think it fit that this court shall say, in a matter of uncertain damages, there shall be a new trial, because if the court had been to fix the damages they might have given less, or a jury might have given less.

The court will not judge by a measuring cast, where matters, properly for all parties, have been left to the sound discretion of a jury, in a subject of which they are competent and proper judges.

It is enough that it may be supported upon the general circumstances, (and there are no special damages assigned) the nature of the injury, the feeling which the plaintiff may have of it, the degree of evidence of malice, are all circumstances properly left to a jury.

I remember, since I sat here, an action by a very poor man, for a charge of criminal conversation with the plaintiff's wife. On a motion for a new trial, on account of excessive damages, new trial was refused.† And so in the case of a very poor servant of Sir ————'s, who had received from his master 150 lashes, and there was evidence that he had said that for a very trifling sum he would receive them again. The jury found the plaintiff 100l. damages. They resented the behaviour of his master; they exercised their judgment accordingly; and the court would not grant a new trial.

This is not the case of the greyhound,* of the value of which the court could form an estimate, and say they have found forty times too much. And it was upon evidence, and the judge not dissatisfied.

Mr. Justice *Aston*—That he thought the case of the greyhound went upon this, that they had thrown in assault and battery, and other matters which the plaintiff had not laid [775]
in

† Alluding, I believe, to *Berkeley* and *Wilford*, above quoted, where the jury gave 500l. damages. The defendant had a place of 50l. a year, as clerk of the Exchequer, during pleasure, which was his whole subsistence.

* *Seale* and *Hunter*, about two years before, where the jury found eighty pounds damages.

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in his declaration, and of which they should not have received evidence.

That damages might, indeed, be so evidently excessive as to be set aside: But that the court had frequently refused it where there was no ground of mistake or unreasonableness.

The damages here are said to be excessive; I don't know they are. In truth who will prove it. He says, that the plaintiff, is a scoundrel, and he will prove it, and this of a man in a profession—an attorney, and in that public manner, and after verdict.

Rule discharged.

Curia Cancellaria.

Before Lord Chancellor Apsley, assisted by Mr. Justice Blackstone.

ON a bill praying an injunction against an edition by Mr. Newbery of an abridgment of Dr. Hawkeſworth's Voyages.

The Lord Chancellor was of opinion that this abridgment of the work was not any violation of the author's property whereon to ground an injunction.

That to constitute a true and proper abridgment of a work the whole must be preserved in its sense: And then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader. Which made an abridgment in the nature of a new and a meritorious work.

That this had been done by Mr. Newbery, whose edition might be read in the fourth part of the time, and all the substance preserved, and conveyed in language as good or better than in the original, and in a more agreeable and useful manner. That he had consulted Mr. Justice Blackstone, whose knowledge and skill in his profession was universally known, and who as an author himself had done honour to his country.

That they had spent some hours together, and were agreed that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.

work. And that this abridgment of Mr. *Newbery's* falls within these reasons and descriptions.

Therefore the bill praying an injunction ought to be dismissed. [776]

Bill dismissed.

The King *against* Woodfall.

THIS cause came on at Guildhall 11th of July, 1774, before Lord *Mansfield*, at the sittings for London, in the King's Bench.

It was an indictment for a libel on the revolution, and on the persons of King *William* and Queen *Mary*.

It was argued by Mr. *Hardinge* for the defendant, to this effect—I never yet heard that barely to attack the government is a scandalous and seditious libel.

That it is not a libel barely to reflect on government if it be done in such a manner as is not likely to excite sedition.

I can't separate from the idea of a seditious libel the tendency to excite sedition. I may be on very slippery ground, being not so versed in the niceties of law as to be able to pronounce positively; but I take it there is no certain definition, from the nature of the thing, what shall be a libel: That will be so at some times which is not at others. But that in general a libel must be calculated to excite sedition.

Just at the time of the revolution it might have had this effect, when men's eyes were not sufficiently opened; it can now have no other than to make the readers laugh at the absurdity of it, or pity the weakness.

An author of note says it is a very gross mistake to say the King is the third estate; bishops are the third estate, and the King is supreme over all.

However improper, this is so nonsensical a division that it can never excite sedition. And of what is said here the same may safely be affirmed.

As to personal reflections upon *William* the third, it is conceivable he might have been a very bad man, and yet the revolution a very excellent and necessary work. Sir *John Dalrymple* has not been arraigned, and yet nothing can be more injurious to the character of *William*. Throughout he gives him two supposed reasons for every thing he does, and constantly assigns the worst as the true.

As to the reflections upon the revolution, they are introduced by an if. If such things be a curse the revolution is a curse. The connection being thus, if the things did not [777]

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exist then the revolution is not a curse, if they are necessary and beneficial then the revolution is a blessing.

Reflections upon King *William* can be no reflection upon his present majesty.

A work has been published of the highest merit, and by an author than whom no body, I believe, has a greater respect for the constitution.

It is the best work that ever has been published upon the laws and constitution; a most elegant, accurate, and systematical work; yet he considers the revolution on very confined principles, but without blame.

An author of very great merit, and attachment to the government, has said a thing more injurious to the revolution, where he calls it a precedent in point of fact; yet this author is not punished or censured.

However I may succeed upon the other grounds, there is one, I am persuaded, I shall succeed in at all events.

That the things and persons intended are not sufficiently certain, and some false.

You are to be satisfied that all the innuendoes laid in the information must be exactly as they are explained: Some are not necessarily true, and some necessarily false. If this be so you must acquit him: For your verdict must go upon the whole; the judgment must follow it; and there can be no separating the guilt afterwards: So that you cannot find but on the whole.

This day eighty-four years is not an æra applicable to the revolution, which is known to have commenced in 1690.

Glorious revolution, g——s r———n, at the end of the information. How glorious revolution? Is it not more consistent with the purport of his letter that he should call it graceless rebellion, supposing him to take his premises as admitted?

A paper cannot tend to excite sedition, of which Mr. Attorney-general could not find out the meaning. And I contend the meaning of these words and dates is sometimes palpably mistaken, and at other times far from clearly discovered.

[778] I apply to you as friends of the liberty of the press, which appears in some degree of danger, when such a stupid performance is so solemnly attacked as dangerous; as friends of the government, as unjust sentences cast an odium upon that; as friends of law and of liberty, which alike require that no man should suffer upon a vague and doubtful interpretation of his words.

Lord Mansfield—Gentlemen of the jury, this is a paper charged

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charged in the information as a false and seditious libel on the revolution.

The revolution is the base on which the present constitution rests; if that fall the whole superstructure falls with it, and all the blessings that have been and are enjoyed in consequence of it.

It does not follow that the libel must be so cleverly written as to have its effect. The dulness of the author, or the good sense and honesty of the readers, with the firmness of government, may all equally frustrate this: But the author is not the less criminal for doing all the mischief he could, and intending more.

If you find that it arraigns King *William* the third and Queen *Mary*, not in their personal character, but as dethroning their father, as being an unjust and wicked act, this, certainly, arraigns the revolution.

The evidence is very clear. Mr. *Hardinge* has rightly argued that you must see the author meant what was imputed to him. It is not that he is accurate as to dates and historical facts. You must see what ideas the author meant to convey, according to your sense of what he has wrote.

If the dates do not precisely answer it is not material, if the meaning is clear.

I don't know as to the point of history what day precisely King *William* and Queen *Mary* were proclaimed. King *William* landed in November; but it was not till after the convention, some months after his landing, that they were proclaimed*. If you think the meaning of K. *W*— and Q. *M*—, g—s r—n, and so of the rest imputed to him by the information, be the true one, you will find him guilty; if not you will acquit him. What will be the consequence of your finding is matter of another judicature.

As to many other things which were argued, they may properly go into consideration upon the judgment passed on this letter, which, I think, is, as it has been stated to be, a very stupid one.

The jury went out, and returned some time after, and found defendant guilty.

The same day another information was tried against the other *Woodfall*, as I understand it, and I believe for the same paper. [179]

For the prosecution—That the paper in question is one of the most general libels ever written. That it traduces every magistrate in this kingdom, and almost every profession; and throws odium upon the revolution, as the source of all the

G g g 2

curfes

curses and calamities of this nation. That one would wonder any Englishman should hope to give an ill impression of that event, to which every Englishman owes the highest blessings, and the greatest share of liberty any nation ever enjoyed.

It is said it is a stupid work. "The characters and things slandered are out of the reach of slander."

The author has been as scandalous and malignant as his understanding would suffer him to be, and his dulness has been no great hindrance in this, as it seldom is. As to the effect—Where is the merit of having been disappointed in a plain avowed purpose of prepossessing men's minds against the revolution, and of course the present government?

I never yet heard that the weakness of the writing, and the brightness of the character which was impotently attacked, should be an argument in favour of the writer. Of both you will judge.

As to the application, every attempt concerning that, either to justify or to alter it, would prove alike useless, as that has been already made. Nor can argument make the interpretation on which the prosecution insists clearer than it is.

The letter speaks of the curse denounced on that day against him who curseth his father, and then infers the judgment against him who proscribes his father, and hires others to murder him with his money.

He imputes all the taxes that have since been introduced, pensions, standing armies, corruption of religion and morality, to that period, and says the "church of England was flourishing before, and now, without the spirit of prophecy, a man may say is perishing."

"Who can say that the rebellion against *James* was not a g——s r——n?"

The stress was endeavoured to be laid that he was in custody: But there appeared to be access to him by any who pleased.

[780] The letter says, "If these taxes are a blessing the revolution is a blessing; if not, a curse." When he has told you religion and morality are corrupted, the church perishing, the state falling, in consequence of the revolution, which he does, only in more words, can it be said that he leaves it hypothetically, and without deciding one way or the other, whether the revolution was a blessing or the contrary.

For the defendant. Mr. Lee—It is not my purpose to defend the paper, if it contains reflections upon the revolution, and upon the character of King *William* and Queen *Mary*, whom

whom I have been ever accustomed to hold from infancy as most illustrious princes, for their public and private virtues. And I hold the revolution to have been the æra from whence our most valuable liberties were secured to us, for permanent enjoyment; and that the right and privileges to which we owe all our blessings were then better ascertained than at any former period.

But you are now not upon the paper or author, but the publisher. If you find him innocent of the intention to publish you must acquit him: For if his mind is innocent the man is innocent. You are not to find that the paper was published, or libellous in itself; both are admitted: but that Mr. *Woodfall* was the publisher: And he cannot be the publisher if he knew not of the publication. His life and character go against it. And though he might have offended persons, and possibly sometimes offended the laws, yet he has always been the defender of this glorious revolution.

There is no title of evidence he knew it, except that it was published and sold in his shop. Upon this general evidence the prosecution rests: And though it may be good and sufficient in general cases, yet not in this particular one, when Mr. *Woodfall* was in confinement, and not in power of conversing with those from whom he could naturally ask information upon such subjects.

It is extraordinary that the accidental publisher of so dull a paper should be expected to incur the punishment and censure demanded against him, when *Sidney* and *Russell* have been insulted, and no enquiry after the author by way of punishment. A writer ought to relate facts. Let him; and if he credits his intelligence let him, and those of his readers who are disposed: But let him not close his narration with observing that he feels the same emotion he should have done at the sight of his son turning his back on the day of battle.

What is there in the work now before you to catch the humour, or, as some may call it, the fashion of these times; What is there to hurt the principles of the revolution, to shake the present government, or disturb any man? But, above all, what is there to fix it on the defendant, who was in prison, and ignorant of the publication? [781]

Lord *Mansfield*—Gentlemen of the jury, whether this be an object of magnitude enough to demand this mode of enquiry is not before you or me: We must do justice upon that which is now before us.

Mr. *Lee* has very properly acknowledged the criminality of the sentences conveyed in this letter upon the revolution and the instruments of it.

Whenever

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Whenever a man publishes he publishes at his peril: For there is no entering into the secret thoughts of a man's heart.

If he had been in close custody, so that his servant could have no access there, I should have thought it a difference very proper to have been left to you; but it is just the same as in his own house; for his servants and all the world had access: And the boy brought the paper to him every day.

Otherwise I should have thought the particular circumstances very proper to have taken it out of the general case; but here it is just as in the case of last Saturday. He either did or did not know it; if he did he is answerable, upon that case; if not he ought to have known it. What may be the consequence is a farther consideration; and what the magnitude of the crime, or the wisdom and prudence of bringing it to this mode of decision. We are bound to do justice on it, whatever may be the consequence, or importance of the question, more or less. If you believe the evidence, as to the publication, and the intent of the paper, as stated in the information, you will find the defendant guilty; otherwise you will acquit him.

Jury came in after some hours, and found the defendant guilty of publishing the paper stated in the information; but did not find it a libel.

Lord *Mansfield*—You must either find the defendant generally guilty, or find what you do find.

They found him guilty of publishing the paper.

Lord *Mansfield*—That is, you find the defendant guilty.

Verdict taken accordingly.

[782] Judgment. And now, Michaelmas term, 26th of November, 1774, Mr. Justice *Aston* delivered the judgment of the court against *S. and H. Woodfall*.

You are brought up to receive judgment for printing and publishing a very seditious and scandalous libel, which appears to the court of a very pernicious and dangerous nature. A libel on the revolution; on the King and Queen who reigned at that happy time.

The army represented as locusts, the church as perishing, religion and morality as utterly extinguished in all ranks of men, and a general curse upon the nation in consequence of the revolution. The weakness and stupidity of the libel is no excuse; that it will not affect wise and considerate men; it is not those on whom it was meant to operate.

The court has considered the nature of your offence, and the circumstances offered in mitigation.

And

And as to you *Woodfall*, your particular situation at that time, which ought to have made you more cautious; and to suffer it to be an excuse would be opening a door for all libels with impunity.

The court sets a fine of 300 marks upon you, and that you be imprisoned till paid.

The same fine upon the other.

Mace against Cammel.

A Woman lives with a person as his wife, and, upon execution levied on the goods for the debts of his creditors, she denies that she is his wife, though she had always passed, and been acknowledged and reputed to be his wife. And she contends the goods are her sole and separate property, and bought with her money.

By the 21 *James c. 19. sec. 11.* It is enacted in case of bankrupts “*that if at any time any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall, by the consent and permission of the true owner and proprietary have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners, that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose the same, as and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt; and for the better payment of debts, and discouragement of men to become bankrupts.*”

[783]

The principal question seemed to be whether this could be extended to a disposition of the goods of another, in the case of a person not within the statute of bankrupts; so as those goods, of which the debtor had acted as ostensible owner, should be taken under an execution for the benefit of his creditors.

And I think it was chiefly argued, they could not upon these two points.

1st. That the preamble limits and declares the meaning of every statute, and the preamble of the statute of *James* speaks of bankrupts only.

2d. That the enacting clause speaks only of bankrupts.

3d. That this is a penal statute and must be construed strictly to the letter, and not carried beyond to what is neither within the words nor professed view of the act.

On

* Vide
Green's
preface to
the spirit of
the bank-
rupt laws.

On the other side—1st. That many times a law was made to remedy a particular inconvenience declared in the preamble; but then the intent of the legislature, on the enacting part, went on to remedy or prevent evils of a similar nature.*

2d. That one express object is for the better payment of debts. And that it would be strange if a person by not being a trader, and therefore not obliged to run the same risque of his fortunes, should not only escape all the penalties of the bankrupt laws himself, but should have it farther in his power to shelter the property of others, used by him as his own; and lent him with a fraudulent purpose to deceive his creditors, by an ostensible ownership and a false security.

3d. Next that at common-law a secret transfer of moveable goods was always a badge of fraud; and so in all cases where the apparent ownership was separated from the real; and in such case it is better that the owner who has equivocated thus against good faith and mutual credit—by outwardly abandoning his claim or giving it over to another, and by a covert reservation retaining it—should suffer, than the innocent and abused creditors.

4th. That in this case, the woman who claims these goods, having assumed to herself the character of the wife of him whose goods were taken in execution, having been acknowledged by him as his wife, having been generally and constantly reputed to be his wife, upon the faith of the appearances and declarations held forth both by him and her, shall not now say to his creditors, I am not his wife. The goods on which you relied as part of your security for your just debt, which you knew to be in the house; which I, by calling myself his wife, and gaining credit as such, did more strongly than by any words assure you were his, and would be yours if your legal demands were not otherwise answered, are not his but mine. And though I had the advantage of passing for his wife, and helping him to deceive you by that advantage, to the detriment and perhaps ruin of yourselves, I will not sustain any part of the burthen: “I will be his wife for all purposes of my own convenience, and I will not be his wife for any purpose of doing you justice.” She can never be permitted to use a conduct which speaks this language, and produces these consequences.

The court was of opinion, and Lord Mansfield delivered the judgment to this effect.

After stating the case.

It is questioned whether the enacting clause of the statute of James went farther than the preamble. If it did not it would

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would be strange, because ever since the case of * *Twynne*,^{* Pasch. 24. Eliz. 3. Rep. 80.} the apparent fraud would make such an act void † as this, which, since that case and since the statute of *James*, is now contended to be good.

But one point makes this very clear in this case which is—she passed as his wife, and carried on affairs as such; and it shall never lie in his mouth, nor in hers, afterwards, to say she was not his wife.

In a case at Guildhall, where a woman had passed as single. I would not permit her afterwards to say she was married, when dealings and trade had been carried on upon the faith of her being single, and upon the credit of her solvency, and not that of the man whom she was pleased afterwards to set up to the creditors as her husband, and the person on whom they must be content to rely for payment of the debts. So that we think upon this point the case is clear.

Indictment.

[785]

ON an indictment for perjury in an affidavit; the perjury was charged that the defendant swore in his said affidavit to the purport * and effect following.

And it sets forth the affidavit; but there is instead of the word “understood” undertood, that he the defendant swore he undertood that, &c. whereas in truth and in fact, &c.

They came after verdict to quash the indictment, and set aside the verdict upon this exception.

It was argued, 1st. That this was a flaw in the indictment, in the material part of the charge in the assignment itself of the perjury, and therefore fatal in an indictment.

2dly, That a verdict would not help it; for though for the sake of settling civil property, the law had permitted such faults to be cured by a verdict; yet no law had ever yet been thought proper to be introduced by the legislature to leave

† 1. *Dona clandestina sunt semper suspiciosa.*

2. *Fraus et dolus nemini patrocinari debent.*

3. *Qui alium rebus per vim aut dolum spoliare vult suas amittito.*

— *Fraus contra alios irrita contra fraudatorem valet.*

Nihil calliditate stultius.

Decipi quam fallere est tutius.

* So, I think, it was; not tenor, vide the distinction in *Will's* case, Sir *James Burrow*, part 4. vol. 4. And Note, I understand that these last sittings after Michaelmas term 1676, before Lord Chief Justice *De Grey*, Lord *Chatham* was non-suited in a prosecution against a printer for publishing a pretended letter of his Lordship's; the indictment setting forth that the tenor of the said pretended letter was as follows: And in the setting forth of the same the word “vigour” was used instead of “rigour.” And I hear Lord Chief Justice said, he would not say whether purport would have done. But in that case there was this farther difference, that vigour was a word not indelible.

leave any thing at large, where the property, life and liberty, of the subject was concerned.

On the other side, that this "undertood" being totally insensible, was not a word, but would become a word, according to the sense and truth by restoring the s, which had escaped the pen; therefore, that this was no case of one word for another, or of a word too much or too little, but only of a letter omitted; by the omission of which no doubt or new sense was introduced; and cases were cited to shew the difference.

The court took time to consider; after which the judgment of the court was delivered by Lord *Mansfield*.

[726] This is the case of an indictment for perjury, and it comes before the court on the reading of "undertood" for "understood." The jury read it understood, and this comes before the court to cure that verdict and set it aside.

Some of the cases are very nice, and to be sure there is a great deal of nicety in criminal prosecutions, and the law ought to be certain. And the case of *Hunt* is brought: But the authority of *Hawkins* denies that case.

And the distinction seems to be where the word is made a different word, *admittat* instead of *amittat*; there the indictment is bad. But a difference in the spelling of the word whereby no new word is produced, nor the real one possible to be mistaken, will not vitiate the indictment.

Though the criminal proceedings ought to be extremely accurate and strict; yet to set a judgment of the jury upon such a nicety would be very bad.

RULE DISCHARGED.

His Lordship cited the case of the *Queen* and *Drake*.

Peremptory.

Vide The motion in the case of General Moltyn, *super*.

PEREMPTORY will not have effect, where without fault of the party a witness cannot be had.*

Popham against Eyre.

Curia Cancellaria.

ON an appeal from the decree of Sir *Thomas Sewall*, now master of the rolls, for performance of a specific agreement.

It

* *Lex neminem cogit ad impossibilia.*

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It was on a bill brought against Mr. *Popham*, as heir of his father; Lord *Mansfield* as mortgagee of the estate, and the purchasers after the treaty was broke off between *Eyre* and Mr. *Popham*, to enable them to compel Mr. *Popham* the heir to a specific performance of the agreement between his father and Mr. *Eyre* the plaintiff. And his honour, after several hearings, decreed a specific performance, and made directions accordingly; from this *Eyre* and the other parties (excepting Lord *Mansfield*) appealed. But Lord *Mansfield* was not included in the decree before the master, they having dropt his Lordship's name before.

The case stated on behalf of the appellant *Eyre* was this. [787]

That his father thought himself deceived by change of the name of the purchaser, and that therefore he did not execute, and refused unless the money were paid down.

And that he cannot execute the conveyance, because already made and complete with his father.

That the defendant is son and heir to his father.

Dispute which side should begin to state.

Wherever it is an appeal from a particular part of the decree, the appellant goes on first.

But where the bill and answer is opened, there, *per Cancellarium*, it should seem the plaintiff in the original cause should begin; because he is called to shew his cause against the appeal, and the specific agreement is to be enforced on hearing all the evidence.

Argued, for the respondent, that he is heir to his father, and the estate of which his father had proposed to dispose.

That 16500l. was the price on which they entered into treaty.

That 17000 was the price understood.

That the agreement was declared by the plaintiff's agent in writing, to be considered by him as actually completed.

That the alteration of the name of the purchaser was made by consent of the defendant and approved.

That Mr. *Popham* said, the reason of his refusal to execute the agreement was, because he understood the agent meant to purchase for himself; and he did not know whether Lord *Mansfield*, the mortgagee, would give up the deed, or whether the money was ready to be paid.

A very idle objection; because the money was secured him at any rate; and upon payment there was no reason to doubt the deeds would be delivered.

The defendant before the master was ordered to put in an answer, and then to put in a farther answer; and before this there

[788] there came out farther evidence which made it necessary to amend the bill. The defendant, the covenantor, made a new agreement with Mr. *H.* for the sale at the original price proposed to the other; there was no possibility of including this in the bill, because it was after the bill brought. The second covenantees interest depends on the indemnity given; yet 16500*l.* is to repay them, and the estate to be secured.

The objections before the master, That this is a verbal agreement not in writing, and therefore within the statute of frauds.

Two letters (the second subscribed) that he would not take less than 17000*l.* this underwriting, and he confesses the agreement in his. The answer, and this would take it out of the statute of frauds upon a full evidence. Though there was a verbal agreement which the court would not have decreed, yet if the defendant admits in his answer, the court will decree a performance. *Grosjon and Laves*, Eq. Ca. abridged, if there be a parol agreement, yet, if admitted in answer, the defendant shall be compelled to perform it, for there is no danger of perjury, which is what the statute meant to prevent.

[Lord Chancellor—*Worsley*—4 G. 2. E. T. bill brought for specific performance of an agreement; the defendant pleaded the statute of frauds and perjuries. It was doubted whether he ought to set out the statute of frauds and perjuries, the chancellor at first thought he should be farther heard: But afterwards that it was exceedingly improper, for then he must admit the agreement, and there would be an end of the statute of frauds and perjuries]

The argument was continued upon the objection of Mr. *Popham*, to enforce this agreement; that it is a conditional agreement, because the money was to be paid at a certain day and has not been paid.

That the agreement had been varied since the writing; that instead of 16500*l.* to be paid down, 10000*l.* was to be paid, and the 7000*l.* taken as a security on the estate. This is by the agreement of the covenantor himself, and then, shall he set up his own act as a bar?

He understood Mr. *Baldwin* was to be the purchaser, and was deceived in this, is another objection. And that he thought *Lore* could not pay the money, and then upon Mr. *Baldwin*'s undertaking for the money he still continues the objection, though he has what he desired.

Philips v. Duke of Buckingham, 1 *Ver.* 227.

The case in *Vernon* was a treaty with the Duke of *Buckingham*, the treaty broke off, and Mr. *Philips* contrived that the secretary to Lord Chancellor *Nottingham* should enter into a treaty with the Duke and not name him; and that Mr. [789] *Nicolls* would say he was treating for Lord *Nottingham*, or Mr. *Finch* his son. It turned out that there was no authority from Lord *Nottingham* or his son, and therefore the court would not decree a performance.

There the purchase was pretended for Lord *Nottingham* or his son the Solicitor-General. The Duke, being willing to oblige any of that family, offered the estate at his own price. Afterwards he entered into a treaty, and on discovery refused to sign the articles, or make conveyance. The Lord Keeper decreed that there had not been fairness used; that Lord *Buckingham* having a great regard to Lord *Nottingham* and his son, declared he would sell cheaper than to any other purchaser.

But if Mr. *Finch* had appeared, and affirmed the purchase he would have decreed, and he might have sold the next moment to Mr. *Philips*.

From the defendant's Answer.

The defendant acknowledges that he was informed of an intention of Mr. *Eyre* to purchase, and answers in that paper which he confesses writing, that he would not sell for less than 17000*l*.

Mr. *Eyre*'s agent writes in answer to this, Sir, I have communicated what you write, that you would not take less than 17000*l*. and though Mr. *Eyre* considered the agreement as absolute for 16500*l*. yet to save farther trouble he will give 17000*l*. and this concludes the agreement. However, for my satisfaction, I desire you would give me a line under your hand.

Lord Chancellor—Read the second answer.

Objected by counsel.

Lord Chancellor—If you read the confession of an agreement out of an answer, you must read all that is relative to the agreement.

[In the second answer—The deponent begs leave to refer to his letter.]

Mr. *Baldwin* complains to Mr. *Popham*, is surprized to find by Mr. *Stokes*'s letter that the affair is not completed, and that he appears not apprized of the scarcity and value of money at this time. However it is very well, as he is concluding an affair which may prove much more beneficial: If Mr.

Stokes

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Stokes and you should after all settle, as I apprehend certainly you will, I shall be at the Crown and Anchor.

[790] Lord Chancellor—Does any thing appear in *Mr. Stokes's* answer?

Letter importing Lord *Mansfield's* agreement to accept of 1000*l.* and the estate as security for the remaining 7000*l.*

Reciting the contract and that it was not reduced into writing.

And he brings an action for non-performance of this very agreement.

Mr. Eyre brings an action for non-performance of this agreement. Instead of 17000*l.* the estate is sold now at last for 16500*l.*

The case referred to proves the seller was imposed upon. He meant to favour the family with whom he lived, and understood himself to be treating. That gentleman did not claim as a purchaser, therefore no body could. This is a sale by public auction; he only wanted the money; if he had the money this was enough.

Argued on the other side—that the master of the rolls was wrong, in decreeing the specific performance of the agreement.

The estate is like all others in the West of England, continually increasing in value, because the rents in the estate are upon lives, and considerably less than the real value; while the agreement is in suspense the lives are wearing out.

Seven years from the treaty they come for a specific performance, on payment of 17000*l.* for the estate, which they were to have paid seven years ago. It is an application against an heir—the disadvantage would be to the heir 5000*l.*

It has been thrown out that we have been so foolish to sell the estate for 16500*l.* the estimate made sufficiently shews, that a person who had an estate in mortgage gained by selling as early as possible; and the person who comes for an equitable relief does not come very favourably when he objects a sale under value, to which he has driven the party against whose heir he claims.

It is stated there are certain general rules for performance of specific agreements. If the court were to lay down general rules, without exception of circumstances, for performance of a specific agreement by which a party should be compelled, it would in truth compel to a greater hardship than those of common law. From their generality and rigour the court would then be a legislation superior to the common law, and much severer. Indeed if the court were to lay down any rules whatever in this matter then circumvention would be favoured,

voured, and the rules of the court would be made the instrument of mere fraud.

There is a great deal of difference between an agreement [791] which will entitle to damages at common law for non-performance, and an agreement which will be carried into execution.

Where the damages would be greater to a party by carrying an agreement into execution, than any damages a jury would give, then equity will not decree. This I argue with the more confidence, because your lordship laid it down in the case of *Pope and Harris*, and it was affirmed, and taken on the same grounds by the House of Lords.

As to the remark that courts of equity have made rules that where an agreement is admitted, it shall be same as in writing; equity will always take care not to supersede any object designed to be secured by an act of parliament.

The end of the statute of frauds was, that the truth of the articles should be known.

If the answer be taken as an agreement in writing, the answer of a person of a delicate conscience will make a great difference to his disadvantage, from the answer by a person of an hard and stubborn one, who would swear away the agreement. This difference a court of equity will not be anxious to introduce.

The terms of payment will not appear with that precision and certainty: And wherever the time would be very material (as in the case of performing an agreement to a mortgagee) your Lordship will not decree against one of the most important terms of the agreement; since he cannot pay the mortgage, and must pay a greater interest than he shall receive rent.

Unless the answer could be so particular as to satisfy all the objects of the agreement, had it been reduced into writing, equity will not decree. Besides it must be seen first, that this is an agreement proper ever to have been put into execution.

Very early Mr. *Eyre* proposed, which alarmed Mr. *Popham*, who declared he would not deal with him or any gentleman of his profession (he was an attorney) unless the money were laid down.

Mr. *Eyre* prevailed upon some body of the name of *Baldwin* to enter into this treaty. Mr. *Popham* would have been ready to enter into the treaty, provided the whole treaty had been to be performed on their part. The whole money was to be paid at Lady-day following. This is the first treaty; it was varied afterwards. They must shew which of the specific agreements remains to be performed.

Mr. *Popham*, as having been disappointed of receiving the 10000l. being obliged to pay the interest from the time in which

which he should have paid the money, little stress is to be laid on his bringing an action.

Supposing the action (which was dropt) could have been maintained for damages, does it follow from thence that they were entitled to the specific performance of an agreement, for the non-performance of which Mr. *Popham* was to have had damages? Are there any cases which say a person who has been dilatory, and exposed himself to an action by his delay, shall have a right to compel a specific performance of that agreement which was delayed by himself.

The doctrine is rather contrary to this position in *Hazel* and *Carrell*, Viner, title contract, pl. 18. where a party has trifled, or shown any backwardness in performance of his part a court will not interpose; and especially if circumstances are altered.

Can there be a greater alteration of circumstances than an agreement for 17000l. which would have satisfied instantly, and the same 17000l. with the loss of all the interest to which Mr. *Popham* by that delay was made liable, on inability to pay off the mortgage.

The memorandum on which they say this agreement was entered into is thus; proposal of 16500l. Answer—He would not take less than 17000l. Had it stood there could it have been contended in this court that this was a complete agreement according to the statute of frauds?

No farther was proceeded in the agreement on one side than proposal of a sum, and on the other the sum laid down under which he would not part with the estate. Is this an agreement in writing? If the statute of frauds were to be thus contrived it would be virtually revoked. If the hasty transactions of persons in the commencement of a treaty were to be taken as a complete agreement, the case would be worse since the statute than it ever was before.

The answer is thus—Mr. *Finch* has communicated the contents of what you wrote with your pencil under Mr. *Baldwin's* letter, that you would not take less than 17000l. And although he considered it as an actual bargain for 16500l. yet as he had acquainted several of his friends upon the subject, notwithstanding your refusal to take less than 17000l. he will be ready to give that sum which concludes the agreement.

[793] “But, for my satisfaction, I desire you would give me a line under your hand.” Was not this to draw him within the statute?

Mr. *F.* the agent for *Baldwin*, proposes an agreement for 17,000l. and desires him to sign a writing, which would be

be more to the satisfaction of Mr. *Baldwin* than any thing he could say.

And Mr. *Popham*, finding it to be insisted on as an absolute agreement, refuses, as it wanted the most important article, the time.

The agreement, says Mr. *Baldwin*, Mr. *Eyre*, and his agent, is concluded by the rules of this court, as we are advised; they wanted abler advisers. "The day is not at all material; if you lose 12,000l. before the agreement should be completed it is not material; it is a complete agreement for us. You will be to go into the Exchequer; we shall have an opportunity of getting rid of the estate in parcels, which, I tell you, is a very good bargain; and therefore we are both tied, but we with a looser chain; and you will have to run through a court of equity before we are obliged to pay the money. And if you sell it to any person else we will make you hear of it in the court of Chancery." This is the kind of language spoken by the conduct of these gentlemen who come for a specific performance.

The agreement was ready for Lord *Mansfield*'s acceptance; Lord *Mansfield* accepted; Mr. *Popham* was ready; they were not ready at the first day; nor on the 22d of June, which last day is subsequent to all the evidence they read in the case.

They proposed the conveyance on the 28th of June, with Mr. *Eyre*'s name, but not the money. And then he might well say, "If I am to be driven to an agreement with Mr. *Eyre*, with whom I have declared I would not treat, instead of Mr. *B.* with whom I had declared I would treat, I will not go farther."

This case is said to be distinguished from the case of the Duke of *Buckingham*. The dispute there was not whether the whole value had been offered; and I refer your Lordship to the report of the case, where the parties would not go into the question of the value.

And the court determined they would leave the election to the vendor, and he would enter into an agreement with a person in whom he had a confidence, and not another, with whom he had not; which is the very determination the heir of the vendor now prays and expects.

It cannot consist either with that common sense to which, [794] in an idle way, we are accustomed to appeal, or with the more circumstantial and certain rules of equity and justice, that an executory agreement with the one should be the

same as with the other. And there is here this farther difference between an instant agreement, which he, the defendant, expected in this case, and which was necessary for his circumstances, and an executory agreement, which in his circumstances was ruinous.

They have not stated any one certain settled explicit agreement, like that which the statute ever expected to see in writing; like that which this court will expect to see some way, in order to entitle to a specific agreement.

And if the statute is to be construed liberally (this is the only rule by which parties are to be bound, if they are to be bound, in equity) they are not to be in a worse condition than if bound in law. What is the agreement by which they are to shew title to a specific performance?

Mr. *Eyre* had said he wanted to buy the estate to sell again to advantage. This in the outset of the affair: And it was a pretty strong objection, especially when he did not pretend to have more than 6000*l.* to pay for it.

Mr. *F.* to enquire whether Mr. *B.*'s purchase was completed, and if not, to know what obstructed it.

March 17.

Application to Mr. *B.* when he would complete, and to fix a day, as the estate was offered a thousand pounds cheaper than it would have been to any other person, on account of prompt payment.

“ Mr. *Popham*, thinking himself bound in honour to
“ discharge his debt to Lord *Mansfield*, if you do not give
“ a peremptory answer, he shall think himself at liberty to
“ treat with another purchaser.”

Treaty respecting the sale was in substance this: It was offered at 18000*l.* at Michaelmas, 1766. Offer to Mr. *B.* without any other than a verbal agreement, March, 1767, for 17000*l.*

[795] The agreement which the court would enforce must fully, exactly and completely appear: And not only this, but it must be such as the court will decree a specific performance, from the reasonableness and fairness of it, both at the time of agreeing and when it is prayed to be enforced.

There must be full evidence, and the court may exercise their jurisdiction as a court of conscience, as in case of an additional remedy beyond what the parties can have at law. If the agreement not complete; if fraud intended, with respect to purchasers; or circumstances or estate altered; or the agreement, though equal at first, is such as
would

would be injurious by a subsequent event; the court will not decree.

Mr. *Baldwin* does not understand it a complete agreement; for after this writing he writes and asks whether it's settled?

He talks of a more advantageous treaty. The agreement drops.

Mr. *Popham* says he would not take less than 17000*l.* he does not say what he will take.

1 *Equity Cases abridged*, 27. * On a marriage treaty the lady's father agreed to give 4500*l.* portion, the settlement to be made four or five hundred pounds per annum; the proper heads set down by a clerk. The father fell sick and died; the match completed; and then the performance of the agreement was insisted. Lord Chancellor said he never knew an instance in which it had been decreed an agreement should bind where nothing had been done by the parties signing, or in part executing, though wrote by their orders. They were only heads set down, which might have been altered or rejected.

• Bawdes
and Am-
hurst.

Mr. *Popham's* agent, Mr. *Stokes*, has done nothing to approve of Mr. *Eyre*. Whatever the motive, a court of equity will not decree for Mr. *Eyre* a specific performance of an underhand agreement, carried on in the name of another person.

This court has been so jealous of giving a specific performance of agreement as an additional remedy to what they might have had at law, that they have declared they would not carry them into execution, where there appeared to be fraud, trilling, or improper conduct.

In the case of the Duke of *Buckingham* they were stamped and inrolled, and yet the court would not execute them. It appears in this case there was a transaction in favour of a party all along with whom Mr. *Popham* had declared he would not treat. This will, therefore, take it out of the benefit of an equitable construction of the statute of frauds; especially where there are subsequent circumstances, which render the specific performance extremely hard and unjust, and perhaps impossible.

If a party making an agreement may be delayed for a day [796] more than the time on which he insisted in the agreement, he may be delayed a year, or for ever. The party on the other side may pay when he pleases, and enforce the agreement when he pleases, in spite of justice, equity, and the true understanding and object of the contract.

Wherever the time is material to the party it is an essential part of the agreement, and must be observed. *Vide Hayes*——

Raym. Agreement to convey over if the title be approved by defendant or defendant's counsel at a time. The time material.

Gilb. 15. Covenant to make a good estate on a day certain. Decree in the Exchequer for a specific performance of the agreement, but refused in the House of Lords, the party applying not having proved that he tendered a title at the time stated, which was material, with respect to performance of the agreement.

It does not appear he was even on the 30th of June, even then ready. Therefore he is left to such remedy, if any, as he may have at common law: Having delayed Mr. *Popham*, who did not intend him to be the purchaser, and having not complied with his agreement to pay the money, which was necessary for Mr. *Popham*.

There was as much occasion to include Lord *Mansfield*, that he would accept the money.

To consider it now as it would have stood independent of the statute of frauds.

Before the statute the court would not execute if not signed by one party, or in part executed.

But if drawn up in writing, signed and sealed, they would. *Marquis of Normandy* against *Duke of Devonshire*. Execution of agreement by one of the parties should bind both.

In this case there was no time where agreement was complete, nor was it signed by either party.

The party who applies for a specific remedy has not conducted himself with that fairness and candour which the court expects.

When Mr. *Popham* disposed of the estate he was to put nothing in his pocket, but merely to have money to pay off the mortgage: Therefore he refused Mr. *Eyre*, as not a ready money bargain.

[797] After the distance and delays in Chancery he would be to lose, even if interest were given him.

Sometimes a specific performance has been decreed making a compensation; but how is this to be made? There is not merely the loss of interest, the sale is hindered: The mortgagee holds. There is every delay and every inconvenience.

If

If you did not keep the proposals the court will say you shall have no advantage.

The interest the court will give him after seven years is four per cent. against five, which is to pay the mortgagee on failure of payment on the day incurred by the fault of those who come for a specific performance.

This case depends much more upon facts than any reasoning or nice points of law.

If this be to be taken as an absolute agreement what will be the fate of proposals from henceforth in the way of treaty? No person will say what he meant to sell his estate for, as thereby the bargain shall be concluded at once.

Where the articles were stamped, drawn out, deliberately examined, the court would not suffer a person to come in who was not the intended purchaser, but left him to his remedy at law.

The case of the Duke of *Buckingham* goes upon the deceit; the parties would not go to settle the value. The only difficulty was the rescinding of a solemn deliberate legal act, which yet was rescinded for the fraud; just such a kind of fraud as in this case.

Scott and *Langstaffe*, before Lord *Camden*, was to rescind the agreement. Lord *Camden* thought fit to oblige *Langstaffe* to pay the costs. A bill brought to give up a lease on the hands of *Langstaffe*, as obtained by fraud.

Lord *Camden*—The principle in equity is clear: But upon the evidence of the case the question is somewhat nice. *Scott*, an illiterate gardener, having purchased an house of Mr. *P.* next to one in which Mr. *P.* intended Mr. *Garrick* should succeed, and Mr. *P.* being unwilling Mr. *Garrick* should have a disagreeable neighbour, it is agreed between them, but not made part of the contract, that *Scott* should not grant a lease of the house to any body not agreeable to Mr. *P.* or Mr. *Garrick* afterwards, if he should succeed, to prevent Mr. *Garrick* having a disagreeable neighbour. *Scott* [798] was applied to by one *Langstaffe* for a lease, but refused, unless *Langstaffe*, who applied, had *P.*'s consent. *Langstaffe* said he knew him intimately, and that there would be no objection. *P.* in fact disapproved, and had never consented to his being tenant, and, so far from knowing him intimately, he had only seen him at a tavern.

Lord *Camden* says, “ *Langstaffe*, a knowing attorney, has “ been mistaken in his ideas of fraud: Because *Scott* did “ not say he was bound, and he, *Langstaffe*, did not say “ he had *P.*'s consent; that therefore there is no fraud. “ *Scott*, it is true, did not say he was bound (he was en-
“ gaged

“ gaged in honour), and *Langstaffe* did not say he had *P.’s*
 “ consent; but he said (which was a deceit, that he knew
 “ him intimately, when he had only seen him once at a
 “ tavern.

“ *Scott*, a gardener, afraid of a suit with *Langstaffe*, a
 “ substantial attorney, is very uneasy. He delays the tale
 “ till he has an indemnity from *Giarrick*, then he joins.
 “ This is the case of *Philips* and the Duke of *Ruckingham*.
 “ No body who has read that case can easily forget it. Let
 “ the agreement be set aside with costs.”

What would have been the situation of Mr. *Popham* if
 no body would have bid upon the bill brought? He must
 have paid interest upon 17,000*l.* and received but 40*l.* rents
 for seven years, till the suit in chancery should be ended.
 He was content, the strongest proof of the hardship, to sit
 down with the loss of seven hundred pounds.

If no positive law had ever been made, and the case had
 stood without it, a court of equity would have said it is
 impossible to assist this contract, obtained by deceit against
 a person in difficulty and necessity.

Considering it upon the statute of frauds, where is the
 agreement signed by the party? Is it the writing with
 the pencil? Is it a writing not offering any general sum,
 but telling him Mr. *Baldwin* would be at the Crown and
 Anchor? This the consideration for Mr. *Popham’s* taking
 17,000*l.*!

But the agreement is confessed in the answer.

The only ground of this being a general rule is in *Equity*
Cases abridged.

But it must be an agreement set forth in the bill, con-
 fessed and plainly appearing; and the statute not insisted
 upon.

[799] What is the confessed agreement? Not to take 17,000*l.*
 at any time, but a certain day. It is not executed, nor can
 now, nor a compensation be given.

The unexpected and surprizing event in their favour may
 save the dismissal of the bill with costs, which is all they
 can expect.

Wales and Baynall.

Mr. *B.* could not have been compelled. Mr. *F.* is a
 subscriber to this pencil; he does not call himself a wit-
 ness to it: It does not appear by what authority he sub-
 scribed, though it may pretty clearly be guessed with what
 meaning. Six days after the last day, 30th of *June*, the
 deeds

deeds are delivered to be executed by Mr. *Popham*, who says he will have nothing to do with it.

The contract with the purchasers for 16,500*l.* was with honour, and the indemnity open, and with candour, to secure them at all events.

The substantial party is considered to be *Eyre*; so he was all along in effect.

Eyre is rejected in November, 1766.

The agreement offered to be signed proves they thought it not executed.

Case where the want of candour and fairness, and not dealing with honest methods, occasioned the court to refuse enforcing an agreement.

Barebone and *Barnes*, 2 Chancery Cases, 121.

B. possessed and interested in lands for a term of sixty years, paying 5*l.* *per annum*, and indebted and in danger of an arrest, by articles sealed, assigned his estate to the plaintiff for 290*l.* and his tools and utensils on the premises, then employed in making brick. Articles dated 16th of March.—Proviso to be void if money not paid in five days. Articles not performed, nor money tendered; but there being no proviso in the articles for discharge of defendant, *Barnes*, for the rent in future, agreed, on advice, that Mr. *Barebone* should purchase the inheritance, or procure a sufficient person to take the assignment from *Barnes*, and secure him, and to that end fourteen days farther time. *Barebone* treated with the reversioners, but they would have nothing to say to him. However, he entered; when does not appear, but it seemed within the fourteen days. On the fourteenth day *Price*, a hawker came, and brought [800] 290*l.* no writing was offered or prepared.

One went, treats for the estate, but would not discover the name of the intended purchaser, but carried on the treaty as for himself; but the articles were filled up with the name of *Barebone*. *Barnes* sells to *Price* for 290*l.* and on *Barebone's* bringing a bill to have an assignment, it was dismissed.

Though equity will relieve on account of fraud, yet not him who is *particeps criminis*; still less him on whose side the whole of the fraud lies, and against an innocent person.

Lord Chancellor—Mr. *Ambler*, your client is in possession of a decree of the master of the rolls. I shall always pay great attention to any solemn determination of his; and therefore, as I confess myself shaken by the arguments
so

so very forcibly urged against the decree, I would like to have a little time to recollect the arguments; and I will give you till Saturday.

I will throw out a few hints how it strikes me, as a question of equity, not only important to the parties in this cause, but as a precedent: Though, probably, it would go on, and then be a precedent.

This is a bill brought for the specific performance of an agreement. Let us first see whether there be any agreement in writing within the statute of frauds.

It is a wise and beneficial statute, and I adopt Lord *Nightingham's* opinion, that it is so wise and beneficial to the public that it deserved a subsidy, as was the language of those times.

I will adopt the proposition of Lord *Hardwicke*, that this court can't repeal an act of parliament.

Fraud is a cause on which this court would interpose to set aside a contract; as in *Scott and Langstaffe*, and many others. I don't mean fraud that would make the party liable to an indictment,

I wish you would see, notwithstanding what Mr. *Bacon* has so widely laid down, whether there is any precedent of the court enforcing execution of an agreement, under circumstances like this.

Lord Middleton against *Wilson and others*.

[801] 1741. Lord *Hardwicke* said he thought the court had already gone too far, in taking agreements out of the statute of frauds, and therefore he would never go a step farther, unless warranted by authorities. I wish, therefore, Mr. *Ambler* would shew me I am warranted by authorities in confirming this decree.

A letter has been an agreement; and any writing almost may be an agreement, upon circumstances.

In the case alluded to by my Lord *Hardwicke*, Marquis of Normandy and Duke of Devonshire, I took a note of Lord *Hardwicke's* decree, and had an opportunity of looking into Lord *Hardwicke's* book, and am glad to find my note agree with it in most circumstances.

Lord *Hardwicke* makes Lord *Somers* say, " It is very true
" that the court has frequently enforced the execution of an
" agreement on notes and letters, as in the case upon a me-
" morandum, but it is where the agreement is full and com-
" plete, and the time fixed. If not fully and completely set
" forth this court will not decree." *Coles and Masters*.

Treaty

Michaelmas Term, 14 Geo. 3. C. C.

Treaty of Lord *Middleton* with Mr. *Wilson*. Agreed to give ten years purchase for the land. And for the house—there were rents upon five cow gates, doubtful whether they were five shillings or one. 3600l. and there was an offer on payment of 4000l.

It was upon the letter they principally founded themselves; the agreement appeared, and nothing seemed doubtful but this cow gate. Lord *Hardwicke* decreed that something being left behind it is not settled, and he decided for a specific performance for Mr. *Wilson*, against the prior purchaser.

I ought not, therefore, to go farther than the authorities will warrant me to go. I think this court is not authorised to repeal an act of parliament in this or any other case; but they may relieve against fraud, because the statute was made against it. As when a father charges his son with 1000l. for his daughter, the son says you need not charge, I will pay; he shall not avail himself of the statute against frauds to withhold payment. Mr. *Baldwin* is not in the circumstances.

Shew me the statute, shew me the precise agreement which he has a right to demand. Mr. *Popham* has all along acted with the greatest honour, candour, and fairness.

I should be ready to affirm any decree of his honour's that I could. He has acted with great ability in a court of equity. But if I should be persuaded I am to decree a specific performance, there is another point; here is a conveyance to be made, on payment of 17000l. The court always effectuates payments as if it was at the instant; and this is the reason why the court is said not always to consider time, because they can make a compensation. It is to be considered what is to be made.

I should be very sorry to decree in such a case before I had thoroughly considered, and before every thing had been argued, as well for the appellant as in support of the decree; I therefore give till Saturday.

Farther adjourned, on account, I believe, of Mr. *Ambler's* indisposition, till the first day after the first seal.

5 December, 1774. At Lincoln's Inn.

Mr. *Ambler*, in support of the decree—It is argued that this decree is wrong, because not warranted by precedents.

Because Lord *Mansfield* named as a party.

It was very proper to make Lord *Mansfield* at first a party; very improper afterward: Because it was not known Lord *Mansfield* had made an actual conveyance, and the bill must have been dismissed as to him.

Coming too late for a specific performance is objected.

Coming

Case where execution of an agreement for an estate at 3600l. was refused to be decreed on account of a rent left unsettled, and doubtful whether five shillings or one.

Coming too soon is objected ; a very inconsistent objection. But this could not be when a specific performance had been refused ; and the objection would have been very strong if the specific performance had not been demanded early.

Objected, that the master of the rolls ought not to have decreed a specific performance.

If it had been right to decree a specific performance, yet that a compensation should have been decreed to Mr. Pepin.

It is said that decreeing a specific performance is discretionary in the court. Stating properly, I admit it, that it is not a thing of course. Discretion in common conversation and in a court of justice are very different : For if the party makes a proper title, it is no more discretionary. In a common sense the court must do it, which is the legal sense to do whatever they shall discern to be just.

Not within the statute of frauds is one objection.

[803] Not complete, another.

Not fair, a third.

It is proper first to consider the true ground of the statute of frauds ; and what was the law before ; and how this act can be affected.

Before the statute parol agreements were executed by the court ; but to avoid fraud writing was required.

In conformity to the reason for which writing was required, equity has formed several rules.

The court will decree performance of an agreement in writing, though not formally drawn.

1st. The court will decree agreements collected from letters. *More and Hart, Ch. Rep.* 284.

2d. The court will decree performance of an agreement signed by one only ; nothing more common than to see a lease signed by one only, and performance decreed.

3d. The court will decree if agreement not put into writing at that time, but agreed to be put into writing.

Leake and Morris, 2 Ch. R. 135.

1 *Ver.* 151. The bill was to have execution of a parol agreement for a lease ; the defendant pleaded the statute of frauds ; the plea was allowed ; but Lord Keeper held, if the plaintiff had laid in his bill that it was part of the agreement, that it should be put into writing it would alter the case.

Suppose parol agreement confessed in answer, the court will decree as if in writing.

The statute of frauds was intended to prevent a particular inconvenience ; if the agreement is confessed, the inconvenience can never happen which the statute meant to prevent.

Michaelmas Term, 14 Geo. 3. C. C.

The moment he confesses, the agreement is executed according to the statute.

Attorney-General *Vez.* May 3, 1748—9. for putting an agreement into execution; the statute requires an agreement executed by the party or his agent: Yet where the agreement appears, there is no danger of perjury, and it is taken out of the statute. And, in such case, I should have no doubt to decree against the heir, though I can find no case as the reason goes throughout. [804]

And secondly, his Lordship says, if the agreement had been in part executed.

2 *Vern.* 455. *Pyke v. Williams.*

Wanley and Sawbridge, Exchequer, G. 2.

Plaintiff's husband devises an annuity to his wife of 400*l.* a year, in case she should release jointure.

Said by all the court except one, though you should not be compelled to confess a promise, yet it was necessary to confess things done to carry the promise into execution. And if such a confession was required to take it out of the statute of frauds, much more shall a voluntary confession be effectual.

Attorney-General and *Ray*, *Lister* and *Fox*.

Lord Chancellor—Is there any case in which there has been a decree founded upon confession? [generally without a part performance.] In some of the cases the Chancellor has been mentioned to have said it, but I never found a decree.

Mr. *Ambler* continued—My Lord, I take it as a principle where there is an agreement in writing;

Agreement confessed by the answer;

Agreement in part performed;

That in any one of these three cases the court will decree a specific performance.

That there is an agreement in writing I must resort to this letter.

Letter which Mr. *Popham* admits to contain an offer of 16500*l.*

He wrote under with a pencil not less than 17000*l.*

This is not merely enquiring about the price.

By the answer which says it concludes the bargain, it was taken.

All the letters to Lord *Mansfield*; the answers; the directions for conveyances; all evidence in writing. [805]

Is this in part performed?

In case of *Lister*, tenant began to repair.

Gutter and *Halsey*, there must be some act clear, with a view to the performance of the agreement.

What

What is done here? Settling of the mode of payment; conveyances proffered, certainly with a view to the performance of the agreement.

There is another case where plea over-ruled, because not said whether defendant had tendered a conveyance, for this would have been a part performance.

The purchaser proceeded on his part; sold out stock.

Whether this a certain and complete agreement is to be considered.

I will not take less than 17000l. I will give 17000l. Many other things may be added, but more is not necessary to make a certain agreement. The letter, conveyance, draughts—is not all certain? I don't see how any of the parties can make a doubt.

The defendant Mr. *Popham* acted upon it as a bargain.

It is objected, performance not to be compelled, because no time fixed for the payment.

If the day had been necessary, then no agreement before a master would ever have been executed, and the inconvenience is exceeding in fixing a day. Disputes about interest would arise; it would be said you have passed the day.

Objected, this is not the agreement originally made, the agreement was varied; therefore the court will not decree a performance.

Suppose it sufficient as it stood originally.

The alteration is for the accommodation of parties, not material in its nature, and by the consent of the parties themselves.

[806] If the agreement had been carried into execution by the parties themselves or the court, and the 17000l. never had been paid to Mr. *Popham*, it was not necessary he should dispose of it; it was to be paid to the use of the fund, it might have been proper and sufficient to pay it to the mortgagee, to whom Mr. *Popham* must have paid.

Objected, that it is a conditional agreement, and condition not performed: and therefore agreement void.

How does this agree with the objection that no day fixed? I know of no case but of a creditor accepting a less sum on condition of payment at a certain day; there the court will not decree a performance when the day is passed.

No day fixed here; but if it had, what was done by the parties?—The delay is allowed.

On account of engagement to pay Lord *Mansfield*, notice given. This is not the fact, and Lord *Mansfield* did not demand, and it is not in evidence. Mr. *Popham* has suffered

very much by the delay, leases, improvement of the estate. This, if it be true, is another question.

Next the head of defraud and deceit. If this could have been conducted fraudulently and deceitfully no doubt it should not have availed the person guilty of fraud. But I beg permission to ask whether there has been any fraud or deceit. What is the difference? May not the person treated with convey over to the other the next day? The case of *Philips* and the Duke of *Buckingham* says he may.

If a party were to say, I have treated with you as a principal, I find you are agent for another, I therefore will not execute; the court would dismiss the bill with costs.

Lord Chancellor—Mr. *Popham* had expressly declared, he would not treat with them.

Mr. *Ambler* proceeded—I come to that part.—Where is the fraud, when Mr. *Popham* had said he would not treat personally with Mr. *Eyre*, that he should treat with him by another person?

The only case in which a man can be said to act deceitfully is, where the purchaser shall not be bound.

The reason why Mr. *Popham* refused to treat with Mr. *Eyre* was, because Mr. *Eyre* had not the money ready. The money was ready. If Mr. *Popham* had not been too hasty, had and waited till the Tuesday, he had seen it.

The letter written by Mr. *Stokes*, I think, is conclusive of the affair.

“ When you treated for 17,000*l.* ready money to be [807]
“ paid at Lady-day, Mr. *Popham* had already refused you
“ for a purchaser. Mr. *Popham* therefore will not treat
“ with you, nor any of your profession, for the professed
“ purpose of selling out in parcels, because he foresees an
“ inconvenience both to him and Lord *Mansfield*. How-
“ ever if Mr. *Baldwin* will pay the money within the
“ course of this week, with interest at four per cent. from
“ Lady-day, Mr. *Popham* will be ready to accept it.”

Suppose he had waited to see.

Upon the Saturday preceding he gives the answer; if he had waited till the Tuesday, he might have made the objection if the money was not ready.

As to the cases cited, I think, that I ought not to go into them.

I know but of one upon which the gentlemen have not much relied, upon which, I beg leave to rely as a case in point for Mr. *Eyre*.

Barebone

Barebone and Barnes. This was not the case of a substantial man, but a man worth nothing, and rents reserved upon the estate, which the seller would have been liable to pay if the other could not.

Mr. Garrick's case. A particular person whom the person treating with, would not turn out this not in writing, the purchaser said that he had talked with the person and no objection. Here was a direct fraud, not merely a treaty without saying for whom, which neither Mr. *Baldwin* nor his agent were obliged to do.

Philips and Duke of Buckingham, a case which does not apply: For neither one nor the other of the parties allowed the contract. But if the person whose name was used had taken up the case, and said that he meant it to be purchased in his name, and he would have it the court would have decreed. If Mr. *Eyre* says *Baldwin* treated for him, this is the very case. The bill is brought in the name of Mr. *Eyre* and Mr. *Baldwin*. If Mr. *Baldwin* declares he will pay he has a right to insist for himself.

Next, suppose the decree of a specific performance whether any, and what compensation to Mr. *Popham*? I wish he would have said what kind of compensation.

A court has never said, the seller shall take the rents and profits, and interest for his money.

[808] When a man is let into possession, he often pays the rent from the last pay day, and the court often divides.

It is suggested the estate is greatly improved; lives are dropt; Mr. *Eyre* will be a gainer; Mr. *Popham* ought to have something for the loss;—no evidence of any great loss. He pays interest to his mortgagee, this is his own fault; he keeps the rents and profits of his estate. In what manner or what kind of compensation shall he have?

He sells at 500l. loss, then how can he gain? He is rather interested that Mr. *Eyre* should be purchaser.

Lord Chancellor—This is a bill brought by *Eyre* and *Baldwin* against Mr. *Popham*, in order to prevail on this court to decree a specific performance of the agreement, which it is said Mr. *Popham* has entered into with the plaintiff *Baldwin*, for the sale of an estate for the sum of 17,000l.

The first question in this cause will be, what was that agreement which is now prayed to be specifically performed. And I was in hopes the counsel for the plaintiff would have stated specially what this agreement was.

Next, supposing there was such an agreement: whether it ought to be performed?

As to the first, I examined the answer and depositions, and if there was an agreement it was on the 30th of June, that in consideration of 17,000l. to be paid 10,000l. to Lord Mansfield, (and which Lord Mansfield accepted) and 7000l. to be left as a security upon the estate, the defendant should convey to Eyre: And they aver on their part, that the deed was tendered to Lord Mansfield who accepted.

This is not an agreement in writing upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the court will decree a performance. It has been said that it is a known rule in this court that where an agreement appears confessed, the court will decree a performance, though no part has been performed; some dictums there have been: But Mr. Ambler confesses that he has found no decree.—That where the substance clearly appears though in parol without any part performed this court will decree an agreement to be executed. I think it cannot be possible; this court cannot repeal the statute of frauds nor any statute. The King has no such power by the constitution entrusted in him; and therefore, there can be no such power in his delegates.

Equity will not decree upon a bare parol agreement ever so clear, not in part performed.

The only case I know that takes a contract out of the statute is of fraud. And the jurisdiction of this court is principally intended to prevent fraud and deceit; where a party has given ground to another to think he had a title secured, the court will secure it to him.

[809]

The ground therefore in making or refusing decrees has been fraud. It can never have been laid down by the court that where the substance appears, it shall be executed. It would not have been so at common law.

In reading of *Bracton*, about forty years ago I made a selection; of which the following is a part.

De acquirendo rerum dominio, l. 2. cap. 27.

Emptio vero et venditio contrahitur cum de pretio convenerit inter contrahentes; dum tamen a venditore arrarum nomine aliquid receptum fuerit: Quia quod arrarum nomine datum est argumentum est emptionis et venditionis contracta. Et in scriptura intervenire debeat non erit perfecta emptio et venditio nisi cum fuerit partibus tradita et absoluta. Et cum ARRAE non intervenerint vel SCRIPTURA, nec TRADITIO fuerit subsequuta, locus erit poenitentiae et impune recedere possunt partes contrahentes a contractu sed si pretium solutum fuerit vel ejus pars, et traditio subsequuta, perfecta est emptio et venditio; nec potest postea aliquis contrahentium a contractu resilire, pretextu pretii non soluti in parte vel in toto, sed agere poterit venditor,
ad

ad recuperandum id quod de pretio defuerit, per actionem competentem sed non ad ipsam rehabendam.

This court never alters the common-law; but in particular circumstances it extends relief, which the common-law from its generality had not provided. But for fraud and circumvention there would have been at common-law a relief similar to that which courts of equity give, either by dissolving or affirming the contract as the conscience of the case requires; for at common-law a man should not take advantage of his own wrong. And common-law would have given the party injured by such contract damages at least; equity restores him to that state in which he would have been if no unfair practices had been used. Common-law in many instances considers a fraudulent contract absolutely void; except as against the author of the fraud, or those who knowingly contributed to it: But as against such persons valid. And equity in this court [810] has peculiar means and rules for the purpose of this relief, and to guide the court in extending or withholding it.

Let us see how far the court has gone—where there has been a contract clear though not in writing, yet if afterwards the party has refused to execute, there if any fraud the court have not permitted the refusal, where the agreement has been very explicit, and the other party has acted upon the faith of it.

Lord Somers is said, in the note I have out of Lord Hardwicke's note-book, to have expressed himself thus.

Lord Hardwicke stated the case of the Marquis of Normandy, and then cited Lord Somers. "It is true the court has frequently and justly interposed for the execution of an agreement, though the agreement only contained in a letter. As in the case of *M. and Hart* where the plaintiff had married upon the credit of it. So where the agreement is confessed upon the defendant's answer, but such answer must contain the full and complete agreement; for if any thing remains unsettled, the court will refuse as in the case of *Coke and Masters*, before Lord Jefferies."

Lord

* These leading rules, which prevail still, were therefore received and in settled practice, as it is reasonable to collect from hence in the reign of Hen. 3. more than five hundred years ago; and the statute of frauds four hundred years after the times of *Bracton*, did, as to this part of it, little more than declare them.

Lord *Somers* seemed therefore to think upon the case of *Mr. and Hunt*, that there must be something done. The plaintiff had married upon the credit of it. In the case of the Marquis of *Normandy*, part of the money had been paid. Is this agreement complete and proved? And is it such, upon the circumstances, that the court will execute it? Suppose there had been an agreement to pay the money, and on the other to receive; but the time did not appear. (Which is always material, but particularly in the case of a mortgagor, where the mortgagee takes four per cent. and was to take five if not paid.) This is so material that *Mr. Ambler* admits, if *Mr. Popham* had waited till Tuesday and not been paid, he would have had a right to refuse.

What performance then? If the defendant paid to Lord *Mansfield* 10,000l. upon the 30th of June, he would execute the conveyance, and take the security for the rest. No money upon the 30th of June.

Mr. Baldwin's agent writes, that he is surprized the treaty does not go on; but it is very well, as *Mr. Baldwin* is on the eve of a purchase which may be more advantageous. And that *Mr. Stokes* must be apprized of the scarcity and value of money. After all, if *Mr. Stokes* and he should agree, he will be at the Crown and Anchor. No treaty settled then, only that it was very well; if they should conclude, he should be at the Crown and Anchor. *Mr. Popham* writes he wont take less than 17,000l. perhaps then he will take 17,000l. if you will pay on a day mentioned; and some time after *Mr. Baldwin* writes back that he will [811] give 17,000l. "which concludes the bargain." Was this sufficient? No day. Was it an agreement complete? The distinction in the case of *Gutter* and *Halfey* was in this very different.

Does *Mr. F.* the agent for the plaintiffs, consider it as an agreement, though he says, it concludes the bargain? He wants a line for his satisfaction.

An abstract delivered; what is this? Only evidence of a treaty in contemplation which might come to be executed.

The terms are altered the 13th of May; application to Lord *Mansfield*. Lord *Mansfield* approves. *Mr. Stokes* hopes *Mr. Baldwin's* money will be ready in ten days; agrees to wait. 17th of June, Lord *Mansfield's* agent writes, his Lordship has appointed Monday at five in the afternoon to execute, as *Mr. Stokes* fixed upon that day; *Mr. Popham* writes that he hopes *Mr. Baldwin* will be punctual, as he has so

often been disappointed, and that he shall think himself at liberty, and obliged to treat with another purchaser, if the money be not paid by Monday next. Here then Mr. Popham was bound to the Monday.

However they are not ready on the 28th of June. And it is said for the plaintiffs that the deeds were necessary to be transcribed, and on or about the 30th of June was appointed for executing the conveyance. Appointed; by whom? I suppose by those who thought it best the conveyance should be re-ingrossed; and this was so material, that Mr. Ambler confesses, if they had not paid on the 30th of June, this would have been sufficient to have put it off.

Mr. Stokes writes—As Mr. Popham agreed to defer for your accommodation, if the money be not paid immediately, Mr. Popham will take such measures as he shall be advised.

Mr. Ambler, though he admits Mr. Popham would have been at liberty, if payment were not made on the 30th of June, yet in another place says the time of payment is not material; it was very material when five per cent. interest was to be paid if the mortgage not discharged. It is always material.

[812] The 22d of June is the last day that appears. But something afterwards was done. They went and caused the conveyance to be re-ingrossed. Mr. Stokes, the person who engrossed for the plaintiffs, has done what I am sorry to say all the parties applying for a specific agreement and their agents have done, endeavoured to impose on the court. One would understand that the engrossment was offered with the name of *Eyre* instead of *Baldwin*. It cannot be; because the very purpose of the re-ingrossment was to change the names, and put *Eyre* instead of *Baldwin*. It is denied by Stokes, and not sworn by S.

He says that, according to the best of his remembrance and belief, the deeds were ready the 21st of June for execution by Mr. Popham, who wanted to go out of town directly. And the deeds were re-ingrossed for the purpose of putting in *Eyre's* name instead of *B.* and there were several blanks in the said re-ingrossments.

Mr. Stokes helped to fill up the blanks in the re-ingrossments with the name of the said *F. Eyre*, instead of *Baldwin*. As I read it you would think it was, helped to fill up the blanks with the name; but it is to be read, helped to fill up the blanks of date and sums in the re-ingrossments; which re-ingrossments had the name of *Eyre* in-
Read

stead of *B.* (that is) afterwards inserted. It is not possible, in the sense in which it was meant to be taken; if it had they should have produced the re-ingrossments, and shewn that Mr. *Stokes* was capable of swearing to deny his own hand.

It is a most scandalous effort to impose upon the court.

Mr. *Eyre's* clerk swears in the same manner.

Mr. *Eyre* swears he has 4000*l.* in his banker's hands, exclusive of 3000*l.* The proper manner would have been, if this could have been sworn, to say that he had 7000*l.* in the banker's hands; but it does not appear where the 3000*l.* were. It cannot be in his banker's hands, because the notes in his own hands were certainly not with his banker. And he adds, and of bills and notes in his own possession.

And this is very material, with regard to what I shall add. I said they were all in the same evasive manner. The agent for the plaintiff swears he had instructions from the complainants, or one of them, to treat for the purchase. He might never have a single instruction from *Baldwin*, and yet this be true.

Exclusive of 3000*l.* the produce of stock sold out—this money was borrowed, and it was not his own. And yet who would not have taken, from the swearing, that it was his own?

But the material thing is, the 30th of June was not the day agreed upon between the parties; the 22d of June was the last day.

What are the circumstances, from beginning to end, to make a court of equity compel an agreement, upon considerations of equity not within the statute?

What are offered are these. Part performed, because the abstract was delivered, conveyances drawn, and money borrowed. This was never the meaning; it is where the party does something as owner. [813]

Mr. *Popham*, very much indebted, wants to sell his estate, in order to lessen his debt. Lord *Mansfield* agrees to take as much as this estate will sell for, in order to lessen the debt. *Eyre* proposed; *Stokes* writes. *Eyre* says he has not ready money sufficient. This will not answer Mr. *Popham's* purpose; he will have nothing to do with him. Then he acts behind the curtain: He treats in Mr. *Baldwin's* name. There is an evasion. This agent said he had orders from the complainants, or one of them, it might be

from *Eyre*. And he makes *Baldwin* write a letter. Is this generous?

But it goes farther, the agent for the plaintiff, writes a letter.

He goes away to Mr. *Popham* (I can't help using an hard expression) in order to draw him in. He carries the letter; he furnishes the pencil; *Popham* says I will not take less than 17000*l*. He then writes back that Mr. *Baldwin* will give that price; so now the bargain is concluded. A short conclusion.

"But pray, Sir, for my sake, only write a line." No circumvention, no design, to enable counsel to say it's in writing, it's an agreement within the statute.

Two days after the agent goes, with a writing ready signed, and proffers it. Mr. *Popham* says, "I will do nothing till I see Mr. *Stokes*." Was this fair? A country gentleman, unacquainted with law, to get him to sign by himself, in the absence of his attorney, a writing with no specified time of payment? Is it candour to entitle to a relief in a court of equity? However, Mr. *Popham* wanted his money; he sends his abstract; the time is put off, not by Mr. *Popham*. On the fourth of March the money to be paid; on the 25th of March not paid; then they enter into a new bargain. Now, therefore, it was all in treaty: And this was that the money should be paid 22d June, 1700*l*. to Lord *Mansfield*.

Deed carried to Mr. *Stokes*, with the names, that is as already explained. After this Mr. *Popham* sees it; he is thunderstruck to discover he has been treating all the while with Mr. *Eyre*, in the name of *Baldwin*.

Has Mr. *Popham* been guilty of any fraud or circumvention? Has he not suffered most materially, by paying interest at five per cent. from the 25th of March? Was he not forced to sell, with 500*l*. loss?

[814] The bill was brought immediately, but it was dismissed two or three times, and made as late as it could, by the delay of the plaintiffs. And this is extremely material, when a specific agreement is insisted on, and the party to be compelled to suffer all the while for the delay.

It is incredible what Mr. *Popham* must suffer; he must pay all the money back, with interest. On the part of the purchasers he has engaged with them, and bound himself to pay back, and given security, and he must pay five per cent. from 1767, to the mortgagee.

I am

Michaelmas Term, 14 Geo. 3. C. C.

I am sorry to have said so much. The master, I have no doubt, thought himself bound by the rules: There can be no other reason. I see the rules in another light. And the court has never compelled an agreement but upon the case of fraud, to take it out of the statute of frauds, where no part has been performed; unless it has been clearly proved in writing subsequent, either by answer or otherwise.

But here the most material part has not been proved, which is the time; which is necessary to be proved whenever the parol agreement is to be executed.

The next material thing, that he had the money ready, is not proved; but the reverse is proved. There is no fraud in the defendant; nor is it such an agreement, taking this as proved, which the court would execute.

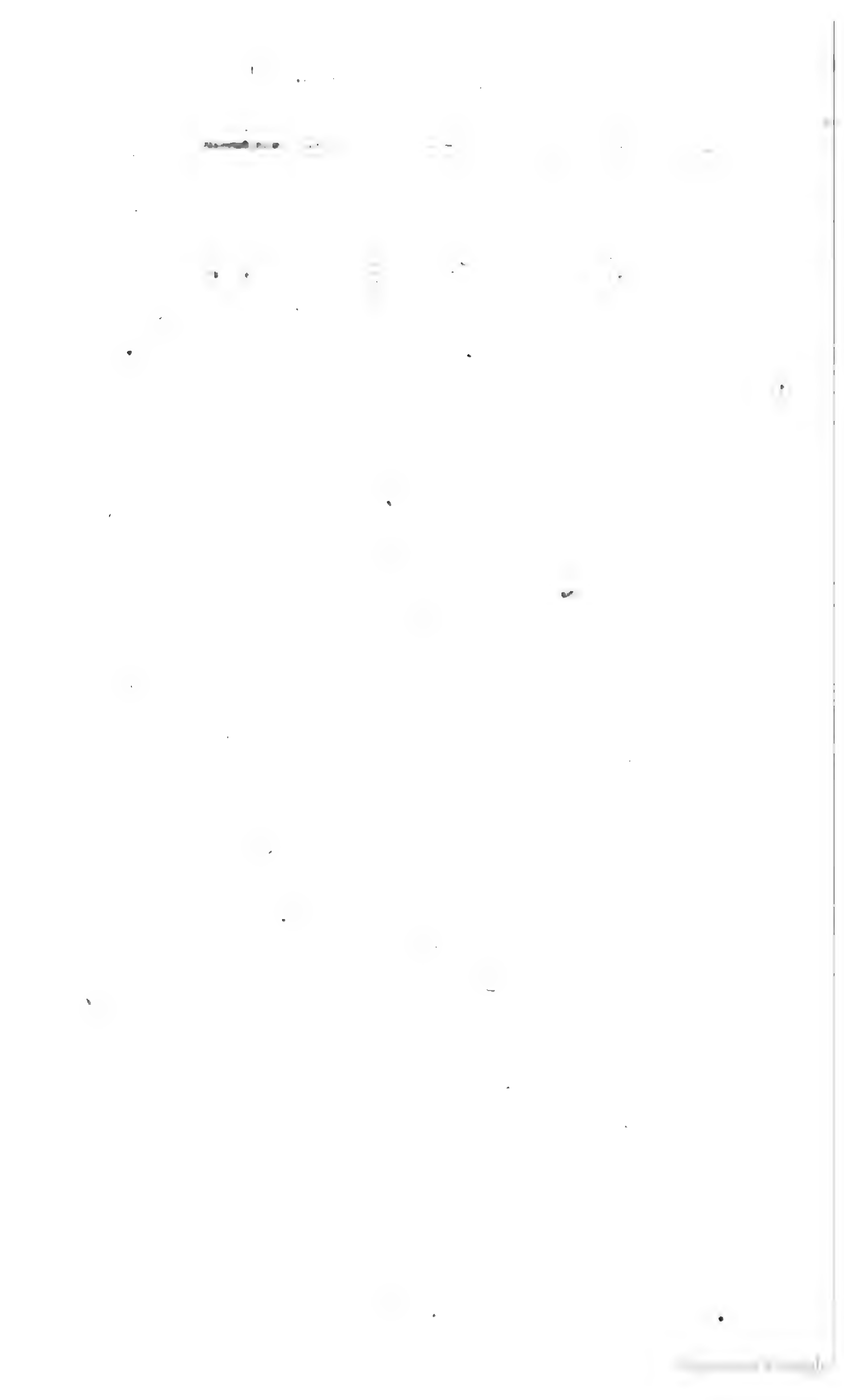
I am, therefore, of opinion, that the decree of the master ought to be reversed.

My only doubt—indeed the only hesitation that I have, is upon the manner of swearing to the filling up the blanks; the swearing to the money, and the other evasive circumstances, whether I ought not to reverse the costs.

The only reason that induces me not to do it is this, I should be very sorry to add costs which could not afterwards be discharged, where they have had a decree.

If it had regularly come before me I would have dismissed it with costs: And, as I differ from the master, I wish they may appeal; because I think there is a judicature which can dismiss it with costs.

Bill dismissed.



P R Æ F A T I O.

INTER has tempestates, atque turbines quibus respublica nostra jam diu jactatur, nullum adeo mali solatium præsentius invenio, quam ut vitali quodam genio conditam credam: Et id sane, non tantum ob diuturnitatem acti jam imperii, neque vim et robur populi, neque insulæ ipsius molem fere inexpugnabilem et hostibus inaccessam; sed ob alia majora; religionem nempe, et leges; et principi, ejus a formamque veterem.

Nam diuturnitas per se enimvero, bene constitutam compagem, felicem sortem, auspiciatum cælum affuisse plerumque monstrat; et venerationem et dignitatem quandam præfert: Sed in humanis rebus tantum abest futuram incolumitatem spondeat ut imminentem interitum verius inde ominemur. Cernimus quotidie saxa ingentia vetustate sublapsa; silvarum immensas umbras arborumque reginam quercum, autæ vi aut humanis manibus concidisse: Urbes subrutas; terram subinde labefactatam: Flumina exarnerunt; mare ipsum ac sidera communem sortem patiuntur. Nasci nova, vetera interire, mutari omnia. Animantia autem omnia si his conferantur immanissimas etiam bestias et ponti monstra, imbecilla, caduca, infinitis casibus obnoxia: Ac quamvis minutis maxima interire. Nos vero, miserum ac incertissimum, inter incerta omnia, humanum genus qui bellis concertamus, qui æterna molimur, ita vivimus ut quod longissimum vitæ nostræ spatium concedatur, centesimus ferme annus, (et quoti hætenus) alii voluptatibus, alii ambitione, plurimi inertia, innúmeri seriis nugis, at tamen nugis, conteramus. Ita fluxo corpore et labili in-

ter

ter cœli, ponti, terræ discordia elementa, inter animantium insidias et ferociam aliorum, vel quod maximum et teterrimum, inter propria humanitatis vitia constituti, et interea vel tegulæ lapsu, vel vermiculi morfu, vel pulvisculo illapso spiramentis animæ interclusis tam nullo negotio confecti, ut in dieculam si liceat perdurare prope instar habendum sit æternitatis.

Militum igitur robur et ducis maximi vis intra paucissimos annos, ne dicam puncto temporis, quo recidant non ignaros alloquor. Homines enim alloquor: Neque ullum clarius aut majus mutationem terrestrium fragilibusque spei pignus quam si memineras hominem te esse quo; verbo omnia incerta conclusa esse videantur.

Romam igitur concidisse ita non mirer ut potius stupeam, tam vastam, et ad extrema subitam potentiae molem, ubi eo usque excrevisset stare potuisse. Persidos, Germaniæ, Galliarum res, non attonitum eum habebunt, neque in tanta instabilitate partim fuisse nec tam sæpe non concussas modo, sed subverfas, non immutata imperia, sed sedibus et radicibus convulsa alio cessisse si cogitet hominum illud robur fuisse; et plerumque unius homunculi humeris nisum. Urbes commercio amplissimo quondam insignes, Tyron, Sidona, Athenas, Corinthos, Carthaginem, mundi olim quædam emporia, video alias partium studio, alias dominandi aviditate, plurimas maximasque luxu, socordia, deorum hominumque contemptu, ex nimis opibus et magnitudine orto, ita evanuisse ut velligia ipsa ægre requiras, et sæpe ne id quidem.

Propugnacula vero, arces commeatus, classes, non vis et fortitudo sunt, sed fortium tantum et bonorum instrumenta: Et adeo non in omnia securum sæpe tutius fuerit spreta ea, quam credita. Alia igitur querenda externis magis certa, humanis viribus magis duratura: Quæ sane non alia usquam videre videor, præter rerum divinarum cultum, et
bene

bene conditum, atque constitutum, reipublicæ statum.

De religione non hujus est instituti multa dicere : Talem vero habemus iis probationibus fundatam, iis ad vitam moresque præceptis, exemplis, auctoritate, ea denique ad civis instruendos optimis artibus, ad rempublicam conservandam, ad generis humani pacem et utilitatem, ea pulchritudine eâ spe, ut satis pro dignitate explicare ejus nimirum sit qui condiderit *Dei*. Leges vero et reipublicæ statum ab eodem Deo, per sapientiam optimorum virorum, tot sæculorum cursu, tot exemplis, tot denum etiam casibus indita, firmata, defensa, aucta, tanta hæc et tam præclara, tam nostræ reipublicæ propria, mira quadam tum Dei providentia, tum majorum nostrorum consilio, virtute, diligentia, fide, deducta, et nobis tradita, sancita, commissa video.

Vix aliam rempublicam aliumve imperii statum inveneris, tam diuturnæ pulchritudinis, tam non imminuti roboris, tam non mutatæ formæ, tam ejusdem ab antiquo ingenii : Ita apte distributis partibus ; tam præclare provisus legibus ; tantæ auctoritatis, clementiæ, æquitatis ; Ea justitiâ, ea in publicam utilitate, in privatos temperantiâ, opinor, nullum. Ut constitutio hæc nostra non jam Angliæ, sed libertatis ; non hominum sed sapientiæ nomen, non legum alicujus civitatis, sed ipsius justitiæ exemplar, et quadam divinæ pulchritudinis quasi relecta facies habeatur.

Mitto multas passim consuetudines ab intimâ Vetusstate ante conspectas Romanas Aquilas, pullum que Cæsarem nobis cognitum, neque adhuc vi temporis aut rerum continuo orbe exesas vel dejectas, atque obtritas. Hæreditatum dico ; dotis a marito in uxorem (quod contra Romæ et Athenis factitatum) aliaque ejus generis ; quorum constantiam tempus, prudentiam usus comprobavit. Mitto quod supplicia illa fœda, equleos, cruces, ardentis laminas, et prodigia cætera crudelitatis et stultitiæ humanæ

humanæ neque leges nostræ agnoscant, neque unquam fere agnoverint : Si druidas forte excipias, et Romæ illius tyrannidem a cervicibus nostris, ægre, at fortissime, depulsam. Ejus inquam Romæ quæ veterem superbiam pravoque cultu superavit ; et utinam meliora ejus afflicta esset. Præterea paucissima, quæ non legum, sed temporum monumenta memoria rerum nostrarum detulit. Statim enim fere ac pullulare incepissent denata sunt, vel perdomita.

Quinimo non modo nocentes meminimus saltem homines esse cujuscunque gentis fuerint ; etiam illud majus nefas vix per bis mille annos fere apud nos extitisse repertum est, crimina per tormenta eliciendi, ut pœna judicium ante cedat et minore supplicio aperte noxius quam innocentia et fortitudo viri plectatur falso crimini inter ignes tortoresque renitentis ; habemus et hoc nostrum, hoc vere nostrum *judicium parium* ! judices ex ipsius rei assensu lectos, domicilio vicinos, conditione proximos, ipsos inter se, ac reo, *parcs*.

Horum non nisi unanimi consensu, de capite civis Anglicani, de existimatione vel fortunâ ullum erat aliquando judicium. Et jam non adeo intercidit pulcherrimum institutum, quin ad hoc quasi præsidium libertatis columen justitiæ, aram innocentiae sapientiæ que oraculum, maxima fere quotidie deducantur. Habemus *magnum concilium* illud *senatus populi que Anglicani* vetustate ante omnium monumentorum fidem ; quæ antiquissima tamen ei suffragantur. Hinc Areopagum, hinc curiam Romanam, inde Spartanam Democratiam conferes ; non modo divisas superamus, etiam conjunctas vincimus. Tum vero etiam illud cogitandum : Romanam nunc reges, deinde consules, post tribunos, dictatores, imperatores denique rexisse. Tanta subinde vicissitudo, ea calamitas, ea moles in se ruentis imperii dominam gentium Romanam concussit, afflixit, solo demum æquavit. Athenas optimi cujuscunque

jusque nomine paucos opibus fretos ita rempublicam habuisse, ut non *magistratus*, sed *domini* viderentur : Penes populum sæpe numero specie fuisse potestatem, summam re vero apud *plebem rapacem, credulum, indocilem sævum*; vel sui ipsius motibus vel flatu oratorum jactatam, tumultuantemque. Spartæ vero virtutes, fere omnes eo induratas, ut in *vitia* pervenerint; et ne quid alieni cuperetur, ne illa quidem propria fuisse, quæ natura maxime voluisset : Conjugia et patrium nomen. Ut potius diversa servitutis genera, diversa vitia, pravæque rerum publicarum species, quam usquam vera respublica esse videretur.

Recentiora et hodierna intuenti quam paucæ mentem incurrunt vere rerum publicarum et libertatis effigies. Magna orbis pars sub tyrannide confessa et aperta squallet, quibus pro libertate est *bona servitus*, et summa felicitas *debere non pati infortunium, suisque ex concessio tanquam alienis*, et quantum vis precario uti. Conjunctam rempublicam septem provinciarum ex pluribus Hispaniensi jugo pene infra patrum memoriam ereptam, quo nunc redactam ! Ubi jura leges, libertas prior ! Venerum senatum an Genuensem adeamus libertatem quæsiturum ! Etiam parvulæ, at nobiles istæ respublicæ (non enim mole sed *intus* virtutem verumque pretium metimur) nescio quo evaserint Lucensis, et Marinensium antiquissimæ. Ultra Pyrenæos an sit scandendum, lacustre Lemarus visendus, si forte deliciæ generis humani et amor cœli, libertas, etiam num illic habitet ? Frustra scrutamur extra : Nos suos alumnos, Britanniam *suam*, *ultimosque* nostri imperii *fines* Libertas esse voluit ac jussit, *suos*.

Et mihi quidem cogitanti non sine divino ope, et singulari quodam favore, maximis que majorum in publicum meritis fieri potuisse animo sedet, ut quam rempublicam ætas nostra vidit, orbisque oblitupuit virique fere omnium gentium *sapientissimi* in
cœlum

cœlum laudibus et nuper et olim extulerint ullam tam diu habuissimus. Regiam potestatem pulchre *ornatam*, tam *legibus exsequendis* provisam, tam imperio *tuendo* armatam, tam provide, et sibi non minus quam publico, *utiliter circumscriptam*! optimatum auctoritatem, populi vim, universæ reipublicæ *Majestatem*, hæc adco velut cœlesti artificio apta atque librata. Leges vero ipsas tam graves, tam antiquas, æquas, *omnium consensu factas* atque comprobatas: Judicia eo usque *sancta a vi, metu, odio, amore, dolo, errore* etiam, quantum in humanis licere videatur, clausa et circumsepta: Eadem, in auxilium omnia, aperta; eadem quæ habenda quæque patienda cuique essent, non ex *suo arbitrio*, sed ex legibus definisse, *quæ eadem voce omnibus loquerentur semper*. Dei cultum simplicem in plerisque purum optimum intreamur: Non coactum immanibus institutis, atque supplicio; non præstigiis jactitatum, non in caligine ac sordibus latentem, non legum auxilio in perniciem hominum irruentem, sed legibus sociatum.

Religionem castam, moderatam, gravem, libertatis fautricem, pacis amantem; benevolentiae, justitiae, *bene parendi et recte imperandi, magistram*. Hujus ævi ducem et solamen; et æternitatis portas referantem. Quaecunque Deo accepta, hominibus chara, publice honesta privatim bona, universis utilia esse censeantur, ea prope omnia mea sane sententia (neque mea tantum, sed optimis judiciis, et consensu maximo) leges videntur Anglicanæ amare atque complecti. Ea hæreditas nobis a majoribus non augenda (satis enim magna atque ampla est) sed retinenda atque sanctissime tradenda posteris, ut a patribus accepimus, devenit.

Longum esset, et prope infinitum neque mei ingenii vel scientiæ, *omnes* leges Anglicanas recensere; et multi modam illam variamque sapientiam vel mirari satis nedum enarrare queam. Sed si cūsus unquam jurisconsulti domus, tanquam Scævola illius, civibus

civibus unquam patuisset ubi adiretur, ubi tanquam ad delphicam sedem confluerent homines, “suarum
“rerum incerti quos ille ope sua ex incertis certis
“compotesque consili dimittat, ut ne res temere
“tractent turbidas.” Quam id in legibus nostris ap-
tum, proprium, et verissime dictum videatur. Quæ
enim unquam legis humanæ tam castæ, tam gravi-
tatis plenæ, tanta auctoritate extiterunt ac *olim* nos-
træ. Quæ tam lites calumnias, vim, dolos, *ambi-*
tum, cæterasque reipublicæ pestes oderint ac veta-
rint omnino necio: Et diu sane his omnibus resti-
terunt, neque adhuc non resistunt.

Et olim sane sapientum domus, jurisprudentiæ
hospitia atque scholas, nobilium juvenum cœtus sti-
passe non miraculo nobis sed rubori fortasse, cum
jam aliquando desierit, esse debeat. Nempe ex illo
uberrimo fonte instituta patria, mores, disciplinam,
parere legibus constitutis et novas si qua opus esset,
ferre, si patria ad id summum munus capeffendum
jussisset, *simul* discebant. Seniores venerari, magi-
stratus colere; *libertatem* et *vere* scire et incorrupto
amare, et fortiter retinere. Neque usquam fere in
veteri nostrâ republicâ major modestia quam in po-
testate summa; neque major potentium in humiles
amor, tenuiorum in optimatis obliervantia ex vete-
ribus institutis et ex *publico bono* reperietur. *Cor-*
rumperere vero ac *corrumpi* maximis imperiis semper
exitiosa, adeo tum sæculo aliena, ut legum-latores
præterirent: Credo ne non tam caville quam *mo-*
nuisse viderentur. Ferme enim quingenis a Gulielmo
primo annis ad Elizabetham reginam neminem am-
bitus damnatum conperio: et multo difficilius in-
venires qui summa in republica munia summamque
potestatem delatam vellent accipere quam qui æquo
animo privati degerent. Nunc, quoniam pleraque
obsolevere, saltem elementa quædam et principia
legum, usu atque auctoritate *maxima* vere dicta
statui referre; et etiam *placita* quædam et legis et
æquitatis *regulas*: eaque ut plurimum non *probare*
(per

(per se *enim* probant non probantur) sed adjunctis tum nostri sæculi tum priorum exemplis illustrare, et quam fuerint in judiciis agnita et quanti ponderis fructusque sint experimentis allatis (quæ maxima rerum bonarum laus) ostendere. Sed hæc si vita longior et propitius annuerit Deus. Nunc tantum ipsa per se utcumque collecta, fasciculum neque magnum neque forte per otium versanti (otium enim nostratibus non in inertia sed in mitiore studio positum reor) omne inutilem. Quo autem proposito et consilio hoc quaecunque aggressus sim breviter liceat aperire. Videor palam facturus; quanquam id neminem fere latere attentiores arbitror jus nostrum non recens natum sed inaccessibleis vetustatis, non temere congestum sed pulcherrime ordinatum, non calliditate quadam ac minutula solertia sed *summa prudentia* constare et ex intimis naturæ ac veritatis fontibus haustum: denique, quod plerosque forte lateat non *chartis* traditum aut in statutis præcipue situm; non forte, non vi aut dolo fictum, sed maxima ex parte ex *jure naturali* pendere, ex sinu *libertatis* fluxisse, *justitiæ adytis* adolevisse: Publice comprobatum, ingenuum, spiritus verique ut ita dicam, sanguinis et succi plenum, in se compositum teres, rotundum. De lege autem Angliæ *communi* non jactanter neque falso dictum eam esse *summam rationem*; quod, nisi qui *principia* ejus obliti sunt facile confitentur.

Illud vero vereor ut sim probaturus quod Anglus Anglos, de laudibus legum Angliæ dicturus, latio sermone (illoque forte barbariæ quam vero latio propiori) alloquar. Ejus vero, sive consilii sive temeritatis nostræ, habeo auctores maximos, antiquos, nostros cives, summa legum lumina, qui idem aliquando fecerint: Quos citando metuo ne potius arroganter defendere quam stulte cepisse consilium arguar. Deinde, quod propius attinet, *maxima* ea ipsa et *regulas*, latio ore plerumque invenias locutas, idque arbitror non sine gravibus causis a sapientissimis

entissimis viris factitatum. Primum ut ne temere prolata sed *entunciata* graviter essent et *infixa* mentibus hæerent : alterum ut quasi togæ Romanæ inditis insignibus non intra linguæ nostræ limites et imperii, olim sane angustis tenerentur, sed ut cives Romani olim, ubicunque terrarum incidissent *civitatem* reperirent et *domi* essent. Maxime autem ut perenni memoriæ pro dignitate ipsorum mandarentur. *Veterem* enim linguam illam, que non ita propriè *Gallica* est dicta jam diu fastidimus, qua legum monumenta vetustate amplissima, usu et auctoritate *summa* continentur, et id *solum* ex omnibus quæ aliquid *Gallici* sapere videantur inter ineptias et quisquilias censemus. Anglicana autem lingua non tantum ab usu quotidiano remotiorem dico sed vulgarem et communem qua ternis quatuorve adhinc sæculis omnes utebantur, non modo alia jam est sed prope omnium ubique gentium minime nobis cognita. Romanam vero doctissimi et prudentissimi viri prævidebant, cum *latissime* pertinere tum *minime* humanis vicibus *obnoxium*, eaque se *breviter*, *plane*, *graviter*, quæ vellent posse eloqui et quasi quibusdam cancellis septam sapientiam (non invidia sed ne usu obsolesceret atque dilaberetur) continere. Neque tam elegantia quam veritatis studiosi neque *amari* ac *suspici* verba quam *mentem* *intelligi* pluris æstimates, quæ *propriis* vocabulis Latinis *destituta* essent non magis veriti sunt *suis* efferre quam disertissimus illæ Tullius Græca usurpare ubi Romana satis comoda deessent.

Ea *maxima* sive *principia* vis sive *aximata* igitur quæ lingua Latina tradita sunt, aliâ vulgare nisi illa prius retulissem *religio* mihi fuit ; neque præfari lectorem aliter volui quam ac ipsa conscripta sunt ac devenere. Pauca quædam de meo addidi longe fateor auctoritate inferiora : sed tamen e sapientium jurisconsultorum nostratum arbitror ducta libris et judiciis firmata.

Exempla

Exempla ipsa *Anglice* afferre alio libro jam parum modo fautricem habeam sapientium prudentiam: Et si aliquid juventuti idem iter capeffenti commodi allaturum liceat sperare. Eaque prope eisdem verbis ac memoriæ mandata sunt ab iis, gravissimis plerumque viris, qui in libros retulerunt: tantum, pro ratione instituti hujus, *succinctius*.

Totum hoc opusculum boni consulas oro; non mei causa sed legum quas amore saltem si minus ingenio ac scientiæ complectar; quæ tecum, bone lector, hic ipsa colloquentur. Mihi, aliquid attulisse præsidii vel etiam lucis vel denique *ornatis* legibus nostris optimis, et clarissimis instar summi muneris ac præmii fuerit: Voluisse et conatum esse, utcunque res eveniret, certe non parum.

MAXIMS

MAXIMS AND RULES

OF THE

LAW OF ENGLAND,

AND

PRINCIPLES OF EQUITY;

Which may be found in the Institutes and various Reports, in Bacon's Law Tracts, and in the Book called the Grounds of the Law, or appear founded in self-evident Deductions of Reason.

1. **SALUS POPULI SUPREMA LEX ESTO.**

2. **DEUM ESSE ex consensu omnium communis orta lex in legibus Angliæ plurimum valet.**

3. **Religio Christiana pars est legis Angliæ communis.**

4. **Populus Anglicanus nemini servire aut consuevit aut debuit nisi Deo et legibus.**

5. **Nemo potest nisi quod de jure potest.**

6. **Rex præsumitur omnes legis regni tenere in scrinio pectoris sui.**

7. **Prærogativa est jus regis bonum & antiquum in decus & tutamen regni secundum bonas & antiquas populi libertates & legis Anglicani juris & consuetudines.**

8. **Lex facit regem.**

9. **Rex non est ubi voluntas dominatur.**

10. **Ignorantia legum neminem excusat, omnes enim præsumuntur eas nosse quibus omnes consentiant.**

11. **Non est lex sed servitus ad ea teneri quibus non consensis.**

12. **Lex communis Angliæ ita regis prærogativam admittit & circumscripta ut ne hæreditatem alicujus tollat lædatve.**

13. **Nullum tempus occurrit regi: Rex numquam moritur.**

14. **Rex nil aliud est quam lex agens.**

15. **Proprium est regis gratiam delicti facere.**

16. **Non potest rex gratiam facere cum injuria alterius.**

17. **Populus Anglicanus non nisi suis legibus quas ipse elegerit tenetur obtemperare.**

18. **Misera est servitus ubi jus est vagum aut incognitum.**

19. **Potestas regia est facere justitiam.**

b

20. **Rex**

20. Rex nil potest jubere nisi per curiam legitime constitutam.
21. Rex non potest malum vel injuriam facere.
22. Regis Curia & Curia Populi Anglicani sive Parliamentum non ex scripto sed ex communi lege sunt.
23. Rex nunquam infra ætatem est.
Rex ad justitiam faciendam non cogitur.
24. Dominus omnium in regno terrarum rex habendus; & ab eo omnes tenent: ita tamen ut *suum cuique* sit.
25. Tenens domino fidem præstare & debita servitia tenetur; & dominus invicem tenenti protectionem & jura sua omnia.
26. Non minus sunt turpia principi multa supplicia quam medico multa funera.
27. Qui parcit nocentibus innocentibus minatur.
28. Lex Angliæ est lex misericordiæ.
29. Nemo potest contra recordum verificare per patriam.
30. Allegans contraria non est audiendus.
31. Turpes tribunalibus arcentur.
32. Res judicata pro veritate accipitur.
33. Discretio est per legem discernere quid sit justum.
34. Quisque præsumitur optime in sua causa dicere.
35. Certa res oportet in judicium deducatur.
36. Nullum damnum sine remedio.
37. Actio non facit reum nisi mens sit rea.
38. Vigilanti non dormienti jura subveniunt.
39. Affectio tua nomen imponit operi tuo.
40. Nemo rem suam amittat nisi ex facto aut delicto suo aut neglectu.
41. Interest reipublicæ res judicatas non rescindi.
42. Judicis est jus dicere non dare.
43. Ratio est anima legis.
44. Qui hæret in litera hæret in cortice.
45. Qui peccat in syllaba peccabit in tota causa.
46. Perjurii poena divina exitium; humana dedecus.
47. Judicium duodecim proborum & legalium hominum veritatis dictum esse per communem Angliæ legem censetur.
48. Ad questionem facti non respondent judices sed juratores.
Ad questionem legis non respondent juratores sed judices.
49. Boni judicis est ampliare justitiam.
50. Sequi debet potentia justitiam non præcedere.
51. Judicia sunt tanquam juris dicta.
52. Melior est conditio possidentis.
53. Nemo factum a se alienum tenetur scire.
54. Quisquis sua facta scire & presumitur & debet.
55. NIHIL CALLIDITATE STULTIUS.
56. Periculosum est quod non bonorum virorum comprobatur exemplis.

Maxims, &c.

57. Judicandum est legibus non exemplis.
58. Qui prior in tempore potior in jure.
Vicinus facta vicini præsumitur scire.
59. Odio & amore judex careat.
60. Ubi eadem est ratio idem est jus.
61. Lex uno ore omnes alloquitur.
62. Cessante ratione legis cessat ipsa lex.
63. De non apparentibus & non existentibus eadem est ratio.
64. NULLI VENDEMUS NULLI NEGABIMUS AUT DIFFE-
REMUS JUSTITIAM VEL RECTUM.
65. Lex est tutissima cassis.
66. Quod lege tuum est amplius esse tuum non potest.
67. De minimis non curat lex.
68. Ad ea quæ frequentius accidunt jura adaptantur.
69. Consensus tollit errorem.
70. Interest reipublicæ ut sit finis litium.
71. Multitudo imperatorum perdidit curiam.
72. Accipere quid ut justitiam facias non est tam accipere
quam extorquere.
73. Consensus facit jus.
74. Culpa est immiscere se rei ad se non pertinenti.
75. Pendente lite nihil innovetur.
76. Idem est nihil dicere ac insufficienter dicere.
77. Ignorantia judicis calamitas innocentis.
78. Quando aliquid prohibetur prohibetur & omne per
quod devenitur ad illud.
79. Quando aliquid cui conceditur; conceditur & id per
quod pervenitur ad illud.
80. Sub clypeo legis nemo decipitur.
81. Sua cuique domus arx esto.
82. Judicis officium est opus diei in die suo perficere.
83. Fatetur facinus qui judicium fugit.
84. Qui non negat fatetur.
85. Lex delatores semper exhorret.
86. Dilatio quæ pro justitia faciat acceptissima; quæ contra
justitiam maxime invisa.
87. Nefarium est per formulas legis laqueos innectere inno-
centibus.
88. Justitia debet esse *libera* quia nihil iniquius venali justitia;
plena, quia non debet claudicare & *celeris* quia dilatio est quæ-
dam negatio.
89. Fraus legibus invisissima.
90. Dolus circuitu non purgatur.
91. De fide & officio judicis non recipitur quæstio; sed de
scientia sive error sit juris sive facti.
92. Non accipi debent verba in falsum quæ competunt in ve-
rum.
93. Nil cuiquam expedit quod per leges non licet.
94. Quodlibet in lege eodem modo dissolvitur quo ligatum
est.

Maxims, &c.

95. Nil utile aut honestum quod legibus contrarium.
96. Ex malis moribus bonæ leges oriuntur.
97. Improbi rumores dissipati sunt.
98. Lex injusta non est lex.
99. Quicquid per se malum est id leges omnibus vetant.
100. Ubi damna dantur victus victori in expensis condemnari debet.
101. Lex est sanctio justa jubens honesta & prohibens contraria.
102. ACTUS DEI NEMINI FACIT INJURIAM.
103. ACTUS LEGIS NEMINI FACIT INJURIAM.
104. Præstat cautela quam medela.
105. Pereat unus ne pereant omnes.
106. Rerum ordo confunditur si unicuique jurisdictio non conservatur.
107. Omnia præsumuntur legibus facta.
108. Stabitur præsumptioni donec probetur in contrarium.
109. Semper pro legitimatione præsumitur.
110. Cuilibet in arte sua credendum.
111. Plus valet oculatus testis unus quam auriti decem.
112. Damnum sine injuria esse potest.
113. Par in parem imperium non habet.
Necessitas vincit legem.
114. Lex neminem cogit ad impossibilia.
115. Turpe impossibile.
116. Fraus & dolus nemini debent patrocinari.
117. Lex certa esto poena certa & crimini idonea & legibus præfinita.
118. Omnis nova constitutio futuris temporibus formam imponere debet; non *præteritis*.
119. Carcer non supplicii causa sed custodiæ constitutus.
120. Poena non debet antecere crimen.
121. Omnis indemnatus pro innoxio legibus habetur.
122. Dormiunt aliquando leges, *munquam moriuntur*.
123. Lex non consilia nuda sed actus apertos respicit.
124. Qui animo peccandi aliquid facit videtur peccasse ab initio.
125. In favorem vitæ libertatis & innocentiae omnia præsumuntur.
126. Pejus est judicio quam per vim injuste facere.
127. Receditur a placitis juris potius quam delicta remaneant impunita.
128. Omnia honeste & ordine fiant.
129. Melius est ut decem noxii evadant quam ut unus innocens pereat.
130. Nulla unquam de morte hominis cunctatio longa est.
131. Judicium redditur in invitos.
132. In civilibus voluntas pro facto reputabitur.
133. In criminalibus voluntas pro facto non reputabitur.
134. Interest

Maxims, &c.

134. Interest reipublicæ ut judicia debitæ executioni mandentur.
135. Executio est executio legis secundum judicium.
136. Malitia supplet ætatem.
137. Qui suspicionem peccati inducit peccat.
138. Furiosus solo furore punitur.
139. Pœna ad paucos metus ad omnes perveniat.
140. Probationes debent esse evidentes perspicuæ & faciles intelligi.
141. Repellitur a sacramento infamis.
Qui non luit in crumena luat in corpore.
142. Nemo est supra leges.
143. Frustra legis auxilium implorat qui leges ipsas subvertere conatur.
144. Impius & crudelis judicandus qui libertati non favet.
145. Angliæ jura in omni casu libertati dant favorem.
146. Mitius imperanti melius paretur.
147. Juri non est consonum ut aliquis accessorius convincatur antequam aliquis de facto fuerit attinctus.
148. Rex non potest subditum renitentem onerare impositionibus.
149. Quod rex contra leges jubet pro injustu reputabitur.
150. Inter arma silent leges.
In republica maxime sunt conservanda jura belli.
151. Mortuus est quem leges non agnoscant.
152. Omnibus infra regnum morantibus legis remedium patet.
153. Exterus non habet terras; habet res suas & vitam & libertatem.
154. Par in parem imperium non habet.
155. Nemini in alium plus licet quam concessum est legibus.
156. Protectio trahit subjectionem & subjectio protectionem.
157. LIGEANTIA NATURALIS INTRA NULLOS LOCORUM LIMITES COERCETUR.
158. Vim vi repellere licet modo cum moderamine inculpatae tutelæ.
159. Quid sit jus & in quo consistat injuria legis est definire.
160. Summa caritas est facere justitiam singulis & omnibus omni tempore.
161. Qui inscienter læsit scienter emendat.
162. Interest reipublicæ ut bonis bene sit & male malis & suum cuique.
163. Qui facit per alium facit per se.
164. Ubi ex jure positivo alicujus gentis res conceditur vel prohibetur leges Angliæ jus ejus gentis in judicio respiciunt ubi actio accrevit.
165. Quid

165. Quod in se malum ubicunque factum fuerit nulla juris positivi ratione valebit.

166. Quod ab initio non valuit tractu temporis non potest convalescere.

167. Rerum suarum quilibet est moderator & arbiter.

168. Qui non prohibet quod prohibere potest consentire videtur.

169. Quod fraude factum est in alios *infactum* est; contra fraudatorem valet.

170. Qui non obstat cum possit *facere* videtur.

171. Qui non verat cum debeat & possit *subet*.

172. Omnes in defensionem reipublicæ vitæ bonisque omnibus cives tenentur.

173. NEMINEM OPORTET LEGIBUS ESSE SAPIENTIOREM.

Maxims of real Property.

174. Hæreditates recta linea debent descendere sed non ascendunt.

175. Possessio fratris de socio simplici facit sororem esse hæredem.

176. Liberum tenementum non potest *pendere*.

Of personal Property, and Property in general.

177. Actio personalis moritur cum persona.

178. Qui *alienas* res negligenter perdit, aut vi vel dolo malo aufert, *suas* amittit.

179. Aer, lux, aqua profluens, feræ, nulli propria omnibus communia.

180. ITA TUO UTERE UT ALIENUM NE LEDAS.

181. Ex maleficio non oritur contractus.

182. Nemo proprietatem rei sibi quarat invito domino.

183. Interest reipublicæ ut nec quis re sua male utatur.

184. Cujus est dare ejus est desponere.

185. Ex nudo pacto non oritur actio.

186. Ex maleficio non oritur contractus.

187. Dona clandestina sunt semper suspiciosa.

188. Traditione pacta firmanantur.

189. Non valet pactum de re mea non alienanda.

190. Omnis contractus turpitudinis legibus invisus.

191. Quod fieri non debuit factum valet.

192. Pacta vel ex naturæ & sanguinis vi vel ex mutuo fructu vel ex auctoritate & præsumptione legis obligant.

193. Pacta reciproca vel utrosque ligant vel neutrum.

194. In restitutionem non in poenam hæres succedit.

195. Poena ex delicto defuncti hæres teneri non debet.

196. Qui sensit commodum sentire debet & onus.

197. Nemo

197. Nemo iudex esse debet in propria causa.
 198. Poena vel remedium ex incremento quod prius erat non tollit.

Of Religion.

199. Dies Dominicus non est Dies iudicis.
 200. Qui serviunt Christo faciunt leges pro Christo.
 201. Nemo militans Deo implicet se negotiis secularibus.
 202. Qui dat pauperibus Deo dat.
 203. SUMMA RATIO EST QUÆ CUM RELIGIONE FACIT.
 204. Ecclesiæ ecclesiæ decimas solvere non debet.

Of Morals.

205. Omne crimen ebrietas & incendit & detegit.
 206. Omnis lascivia legibus vetita.
 207. Alea & ganeo res turpissimæ.
 208. Res stulta est nequitiae modus.
 209. Principiis obsistendum.
 210. Qui bonis viris pauperibus dat legibus opitulatur; qui malis & inertibus segetem malorum fovet & legum opprobrium.
 211. Qui inertibus dat industrios nudat.
 212. Veritas a quocunque dicitur a Deo est.
 213. Extrema potius pati quam turpia facere.
 214. Servile est expilationis crimen.
 214.* SOLA INNOCENTIA LIBERA.

Of Husbands.

215. Omnia Uxoris durante conjugio Mariti sunt.
 216. Uxor et Maritus unum in lege.
 217. Maritus in delicto uxoris tenetur.
 218. Consensus non concubitus facit matrimonium.
 219. Uxor sub potestate viri.
 220. Charta ejus quæ sub potestate viri sit in lege nulla.

Of Parents.

221. Pater est quem nuptiæ demonstrant.
 222. Parentum est liberos alere etiam nothos.

Children.

223. Nothus nullius est filius.
 224. Liberi parentibus qui nequeant victum tolerare opitulantur.

Servants.

- 225. Non omnia domino in servos licita.
- 226. Dominus vel causam servi vel personam inculpato defendet; etiam ubi alii non liceret.
- 227. Actus servi in iis quibus opera ejus communiter adhibita est actus domini habetur.
- 228. In civilibus ministerium excusat in criminalibus non item.
- 229. Injuria servi dominum pertingit.

Of the Interpretation of Statutes.

- 230. Contemporanea expositio est optima.
- 231. Maledicta expositio quæ textum corrumpit.
- 232. Lex beneficialis rei consimile remedium præstat.
- 233. Quæcunque intra rationem legis inveniuntur intra ipsam legem esse judicantur.
- 234. Confirmatio est possessionis jure defectivæ per eos quorum jus est rati habitio.
- 235. Generale dictum generaliter est intelligendum.
- 236. Absoluta sententia expositore non indiget.
- 237. Optima interpretis legum consuetudo.
- 238. Ubi lex est specialis et ratio ejus generalis generaliter est accipienda.
- 239. Leges posteriores priores abrogant.
- 240. Reservatio ut et protestatio non facit jus sed tuetur.

Of Deeds.

- 241. Verba fortius accipiuntur contra proferentem.
- 242. Ubi duo pignantia in charta concurrunt prius ratum esto.
- 243. Benigne faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat.
- 244. Nimia certitudo certitudinem ipsam destruit.
- 245. Nullius charta legibus potest derogare.
- 246. Verba legis non ex vulgari sensu sed ex legis sensu, neque laxam et precariam sed certam et legibus præfinitam interpretationem requirunt.
- 247. Lex nostra neminem absentem damnat.
- 248. Ambiguitas verborum latens verificatione facti tollitur.
- 249. Ambiguitas verborum patens nulla verificatione excluditur.

Of Wills.

- 250. Testamenta propter inopiam consilii ad mentem testatoris interpretanda etsi verba solemnia desint.

251. Si duo in testamento pugnancia reperientur ultimum est ratum.

252. Testamentum nisi post mortem testatoris vim non habet.

253. Ubi sustuleris revocationem renatum est testamentum.

Rules common to Wills and Deeds.

254. Verba generalia restringuntur ad habilitatem rei vel personæ.

255. Verba relata id maxime operantur ut inesse videatur.

256. Intentio legitime cognita et legibus consentanea maximi habenda.

257. Donatio quælibet ex vi legis sortitur effectum.

258. Non dat qui contra leges dat.

Rules concerning public Rights concurring with private.

259. Necessitas publica major est quam privata.

260. Quando jus regium et subditi concurrunt jus regium præfertur.

Other general Maxims and Rules.

261. Res inter alios acta alteri nocere non debet.

262. Dignus mercede operarius.

263. Periculosum est res novas et inusitatas inducere.

264. Plus peccat auctor quam per quem agitur.

265. Possessio contra omnes valet præter eum cui jus sit possessionis.

266. Prohibetur ne quis faciat in suo quod nocere posset alteri.

267. Panis egentium vita pauperum et qui defraudat eos vir sanguinis.

268. Nunquam recurritur ad extraordinarium ubi valet ordinarium.

269. Lex spectat naturæ ordinem.

270. Quod remedio destituitur ipsa re valet si culpa absit.

271. Debitum sequitur personam.

272. Qui prior in tempore potior in jure.

273. Cujus est solum ejus est usque ad cælum.

274. Infantes de damno præstare tenentur; de pœna non item.

275. Non minor est proditio legis quam regem velle perdere.

276. Majus

276. *Majus trahit ad se minus.*
 277. *Certum est quod certum reddi potest.*
 278. *Accessorium non ducit sed sequitur suum principale.*
 279. *Quædam in majus malum vitandum permittet lex quæ tamen nequaquam probat.*
 280. *Multa non vetat lex quæ tamen tacite damnat.*
 281. *Multa non legibus humanis sed foro divino pertinent.*
 282. *Omnia Deo grata, hominibus utilia, reipublicæ honesta, privatis justa et commoda probant leges: Et pro viribus cuique imponunt.*
 283. *Quando plus fit quam fieri debet videtur etiam illud fieri quod faciendum fuit.*
 284. *Quod semel placuit in electionibus amplius displicere non potest.*
 285. *Ubi factum nullum ibi fortia nulla.*
 286. *Terra transit cum onere.*
 287. *Nemo forestam habet nisi rex.*
 288. *Præscriptio non datur in bona felonum nisi per recordum.*
 289. *Non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a quibus constituuntur.*
 290. *Persona conjuncta æquiparatur interesse proprio.*
 291. *Ubi duo jura concurrunt in eadem personâ idem est ac si esset in diversis.*
 292. *In jure non remota causa sed proxima spectatur.*
 293. *Potius est privatum incommodum quam publicum malum.*
 294. *Quilibet renunciare potest juri pro se introducto.*
 295. *Solus Deus hæredes facit non homo.*
 296. *Modus et conventio vincunt legem.*

Bodies Corporate.

297. *Collegium seu corpus corporatum nisi regiis constitutionibus non potest existere.*
 298. *Rex nil dat nisi per recordum.*
 299. *Corpus corporatum non habet hæredes neque executores neque mori potest.*
 300. *Si quid universitati debetur singulis non debetur, neque quod debet universitas singuli debent.*
 301. *Sodales legem quam volent, dum ne quid ex publica lege corrumpant sibi ferunt.*
 302. *Corpus corporatum ex uno potest consistere.*
 303. *Corpus corporatum neque in lite sisti neque utlagari, neque bona forisfacere, neque attinctum pati, attornatum facere, neque excommunicari potest.*
 304. *Rex non potest conjunctum tenere cum alio.*

305. Rex neque solvit damna in lege neque recipit.
306. Rex lege cadere non potest.

Infants.

307. Infans est qui propter defectum ætatis pro se fari nequeat.
308. Contractus infantis invalidus si in damnum sui spectet.

Of the Church.

309. Ecclesia semper in regis est tutela.
310. Qui altari serviunt ab altari vivant.
311. Nemo potest episcopo mandare præter regem.
312. Ubi remedium in foro seculari ejus rei jurisdictio curiis secularibus tantum datur, nisi servato jure ecclesiæ ipsis verbis.
313. Meliorem conditionem ecclesiæ suæ facere potest prælatus deteriorem nequaquam.

Other general and particular Maxims.

314. Ubi non est lex ibi non est transgressio.
315. Jura sanguinis nullo jure civili dirimi possunt.
316. Uxor in mariti potestate cum sit non obnoxia est in causis reatus minoribus; aliter in majoribus proditione et homicidio.
317. Jurata debet esse omni exceptione major.
318. Mandata licita strictam interpretationem recipiunt; sed illicita latam et extensivam.
319. Parum proficit scire quid fieri debet si non cognoscas quo modo sit faciendum.
320. Qui omne dicit nihil excludit.
321. Exceptio probat regulam.
322. Nemo contra factum suum venire potest.
323. Derivativa potestas est ejusdem jurisdictionis cum primitiva.
324. Quod fieri vetatur ex directo, vetatur etiam ab obliquo.
325. In fictiore juris semper subsistit æquitas.
326. Causa publica vicarium non recipit.
327. Respondeat superior.
328. Caveat emptor; caveat venditor.
329. Non est deleganda reipublicæ cura personæ non idoneæ.

330. Ex

330. Ex diuturnitate temporis omnia præsumuntur sollemniter acta.

331. Jus accrescendi inter mercatores locum non habet.

332. Jus accrescendi præfertur oneribus.

333. DIGNITATES REX DAT, VIRTUS CONSERVAT, DELICTA AUFERUNT.

334. Dignitas supponit officium et curam et non est partibilis.

Custom.

335. Consuetudo est bonus rationabilis *certus* et *communis* loci alicujus usus cui memoria hominis non currat in contrarium.

336. Consuetudo totius Angliæ est lex totius Angliæ communis.

337. Consuetudo non præjudicat veritati.

338. Consuetudo alicujus loci lex est ejus loci; legi communi specie diversa sed non in genere contraria.

339. Consuetudo maneriorum domini voluntatem regit.

340. Consuetudo neque injuria oriri neque tolli potest.

341. CONSUETUDO POPULI ANGLICANI ET COMMUNIS LEX LIBERTAS.

342. Libertas est cum quisque quod velit faciat modo secundum leges, bonas, *communi consensu latic, certas, præfixas, apertas.*

343. Nolumus leges Angliæ mutari quæ hucusque usitatae sunt atque approbatae.

344. Majus est delictum seipsum interficere quam alium.

345. Libertas nullo pretio pensabilis.

346. Minima poena corporalis est major quavis poena pecuniaria.

347. Volenti non fit injuria.

348. Pirata communis omnium hostis.

349. Verba homicidium non excusant.

350. Verba temere prolata parum curat lex.

351. Generalis gratia prodicionem et homicidium non excipit poena.

352. Lex orbis, insanis, et pauperibus, pro tutore atque patente est.

353. Hæreditas ex dimidio sanguine non datur.

354. Custos corporis cujusque infantis est is esto ad quem hæreditas nequeat pervenire.

355. In præsentia majoris cessat potestas minoris.

356. Omne jus et omnis actio injuriarum tempore finita et circumscripta sunt.

357. RADIX ET VERTEX IMPERII IN OBEDIENTIAM CONSENSU.

358. Quoties

358. Quoties aliquid dubitatur vel male est, ad principia recurrendum.

359. Qui beneficium legis extra ordinem quærit puras manus afferto.

360. Qui alterum incusat ne in eodem saltem genere æque sit incusandus.

361. Nemo tenetur seipsum accusare.

Of Equity.

362. Æquitas ex lege generaliter lata aliquid excipit.

363. Æquitas sequitur legem.

364. Fraus æquitati præjudicat.

365. Quod fieri debuit pro facto censetur.

366. Præsenti periculo succurrendum nequa oriri possit injuria.

367. Quod conscientia vult ubi lex deficit æquitas cogit.

368. Æquitas nunquam contravenit legi.

369. Æquitas non medetur defectu eorum quæ jure positivo requisita alium.

370. Culpa vel poena ex æquitate non intenditur.

371. Qui æquitatem petit æquitatem faciat.

372. Æquitas uxoribus, liberis, creditoribus maxime favet.

373. Æquitas rem ipsam intuetur de forma et circumstantiis minus anxia.

374. Æquitas vult spoliatos, vel deceptos, vel lapsos ante omnia restitui.

375. Æquitas non vaga atque incerta est sed terminos habet atque limites præfinitos.

376. Æquitas non vult res novas atque inusitatas inducere.

377. Ubi lex communis et æquitas in eadem re versantur æquitas alia via agit sed non aliter sentit.

378. Æquitas est quasi æqualitas.

379. Æquitas non facit jus sed juri auxiliatur.

380. Æquitas vult omnibus modis ad veritatem pervenire.

381. Suppressio facti tollit æquitatem.

382. Æquitas supervacua odit.

383. Æquitas nil statuit nisi in partes.

384. Æquitas ignorantiae opitulatur oscitantiae non item.

385. Æquitas in paribus causis paria jura desiderat.

386. Æquitas rei oppignoratae redemptionibus favet.

387. Æquitas non sinet eum qui jus *verum* tenuit *extremum* jus persequi.

388. Æquitas non sinet ut eandem rem duplici via simul quis persequatur.

389. Omnia

389. Omnia præsumuntur in odium spoliatoris.
 390. Æquitas in eum qui vult summo jure agere summum jus intendit.
 391. Æquitas non supplet ea quæ in manu orantis esse possunt.
 392. Æquitas non tenetur adjuvare ubi non est nodus dignus vindice.
 393. Æquitas jurisdictiones non confundit.
 394. Nil iniquius quam æquitatem nimis intendere.
 395. MELIUS EST JUS DEFICIENS QUAM JUS INCERTUM.
 396. DECIPI QUAM FALLERE EST TUTIUS.
 397. Æquitas neminem juvat cum injuria alterius.

Of Pleas and Indictments.

398. Placitorum alia dilatoria alia peremptoria.
 399. In capitalibus quid, quomodo, quando, ubi, a quo factum, cum circumstantiis sollemnibus, debet exponi.
 400. In capitalibus sufficit generalis malitia cum facto paris gradus.
 401. Placitum nemo cassabit nisi melius dando.
 402. Qui ordine ulteriora admittit præcedentia affirmat.
 403. Utlagatus non potest placitare.
 404. Duplex placitum non admittitur.
 405. Ubi lex cogit aliquem ostendere causam, necesse est quod causa sit justa atque legitima.
 406. Circuitus in lege odiosus.
 407. Qui non vult intelligi debet negligi.
 408. Qui causa decedit causâ cadit.
 409. Qui tempus prætermittit causam perdit.
 410. Placitum mendax non est placitum.
 411. Ut ne quid nimis cavendum; ut ne quid deficient duplo cavendum.
 412. Superflua obstant; defectiva perimunt.
 413. Placitum debet esse verum, sufficiens, certum, simplex, et brevi congruens, et præcedentibus constans et ordinem spectans.
 414. Placitum affirmativum sine negativo exitum non facit.
 415. Placita negativa duo exitum non faciant.
 416. Placita debent apte concludere.
 417. Placita ex directo esse debent et nil per inductionem supponere.
 418. Habendum in charta vel auget vel restringit sed non novum inducit.
 419. Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant.

Of Actions of Slander on the Case.

420. *Innuendo non facit verba per se actioni obnoxia si aliter non essent.*

421. *Ubi duo sensus occurrunt mitiori standunt.*

422. *Aperte impossibilia cum dicuntur non faciunt calumniam.*

423. *Debet esse vel aliquod speciale damnum emergens vel saltem aliquod gravamen quod nocere possit et videatur probabiliter nociturum.*

Of Inheritances and incorporeal Rights.

424. *Non est exhereditatio nisi hereditas alia transferatur.*

425. *Prescriptio est titulus qui sequitur personam, ex usu et tempore substantiam capiens ex autoritate legis.*

426. *Modus debet esse certus rationabilis et perantiquus.*

427. *Modus de non decimando non valet.*

Other Maxims of civil and criminal Justice, Order and Policy.

428. *Crimen omnia ex se nata vitiat.*

429. *In civilibus proxima et directa præstare quis tenetur; in criminalibus etiam consequentia.*

430. *Nemo bis punitur pro eodem delicto.*

431. *Nemo bis in periculum veniet pro eodem delicto.*

432. *Crimen ex post facto non diluitur.*

433. *In capitalibus minor est poena cogitationis manifestæ quam conatus ex actu directo; et minor conatus quam parati facinoris: Ut sit poenitentiae locus. Sed in proditione in terrorem aliter statutum est.*

434. *Cruciatus legibus invisit.*

435. *Particeps criminis non est audiendus.*

436. *In pari delicto potior est conditio defendentis.*

437. *Nemo procerum vel in jurata poni vel seneschallus materii esse debet propter dignitatem.*

438. *Beneficium clericale omnibus patet ubi poena capitalis statuto inducitur nisi ex expresso tollatur.*

439. *Nemo qui non sit clericus beneficium clericale habebit bis.*

440. *Metus quem agnoscunt leges in excusationem criminis est talis qui cadere possit in constantem virum.*

441. *Fama est constans virorum bonorum de re aliqua opinio.*

442. *Ubi lex est specialis et ratio ejus generalis generaliter est accipienda.*

443. *Cessante*

443. Cessante causa cessat effectus.
444. Unusquisque paci et justitiæ publicæ tenetur succurrere.
445. QUAMVIS ALIQUID EX SE NON SIT MALUM TAMEN SI MALI SIT EXEMPLI NON EST FACIENDUM.
446. JURISCONSULTI OPERA EST HONORARIUM QUIDDAM NON MERCENARIUM.
447. Qui extra causam divagatur calumniando, punitor.
448. Communiter unum officium est excusatio alterius.
449. Spoliatus debet ante omnia restitui.
450. Summum jus summa injuria.
451. Apices juris non sunt jura.
452. Par scientia pares contrahentes facit.
453. Rex non potest injtum civem regno depellere.
454. NEMO IDONEUS PUBLICUM MUNUS IMPOSITUM POTEST RECUSARE.
455. Ubi substitui vicarius potest non est cogendus quis ad substituendum sed si substituere velit inveniat idoneum.
456. Fœminis et infantibus per vicarium multis muneribus licet fungi.
457. Ministeria recipiunt vicarium sed non item pleraque judiciaria.
458. Actus judicarius coram non judice irritus habetur; de ministeriali autem a quocunque provenit, ratum esto.
459. Quæcunque lex vult fieri non vult frustra fieri.
460. Actionum genera maxime sunt servanda.
461. Infinitum in jure reprobatur.
462. Excessus in re qualibet jure reprobatur communi.
463. Quicquid contra bonos mores facit jure communi re- titum.
464. Ubi vetat quid lex neque pœnam statuit pœna in dis- cretione judicis est.
465. Nil tam proprium imperii ac libertatis quam legibus vivere.
466. Nulla pœna capitis nulla quæ hominem remve ejus destruat esse potest nisi legibus præfinita.
467. Non crimen per se neque privatum damnum sed publi- cum malum leges spectant.
468. Venia non potest antè venire delictum.
469. Excambium non potest esse rerum diversæ qualitatis; neque excambium inter tres partes datur.
470. Satisfactio non fit de minori.
471. Venia privatim læsi non sufficit legibus.
472. Non est dives rex ubi subditi pauperes.
473. FIAT JUSTITIA RUAT CÆLUM.
474. Verba intelligenda secundum subjectam materiem.
475. Quæ in partes dividi nequeunt solida a singulis præ- stantur.
476. Utile per inutile non vitiatur.
477. Remoto impedimento emergit actio.

478. Actus legitimi non recipiunt modum.
 479. Admiralitas jurisdictionem non habet super iis quæ communi lege dirimuntur.
 480. Curia ecclesiastica locum non habet super iis quæ juris sunt communis.
 481. Æquum et bonum est lex legum.
 482. Allegari non debuit quod probatum non relevat.
 483. Conscientia legi nunquam contravenit.
 484. Ira hominis non implet justitiam Dei.
 485. Ephemeris annua pars legis Anglicanæ.
 486. Universus terminus in lege dies unus.
 487. In lege omnia semper in præsentì stare censentur.
 488. Benedicta est expositio quando res redimitur a destructione.
 489. Beneficium non datur nisi officii causa.
 490. Bénigne faciendæ sunt interpretationes ut res magis valeat quam pereat, et ut voletur repugnantia et supervacua.
 491. Bonum necessarium extra terminos necessitatis non est bonum.
 492. Cessa regnare si non vis judicare.

Of Chancery.

493. Curia Cancellaria non nisi parlamento subdita.
 494. Curia Cancellaria contractibus in plenum redigendis favet.
 495. Æquitas nomine pœnæ constitutis remedium ex æquo et bono præstat.
 496. Æquitas Curiae Cancellariæ quasi filia conscientiae obtemperat secundum regulas curiæ.
 497. Æquitas pars legis Angliæ.
 498. Æquitas erroribus medetur.
 499. Æquitas casibus medetur.
 500. Æquitas defectus supplet.
 501. Æquitas nunquam liti ancillatur ubi remedium potest dare.
 502. Æquitas vult donum quod alteri oblit ex causa æque favorabili esse ac id quod aufert.
 503. Æquitas opitulatur ubi pensationi damni locus est.
 504. In maxima potentia minima licentia.
 505. Quilibet ex virtute sua non imbecillitate adversarii debet vincere.
 506. Ex nuda submissione non oritur actio.

Other General Maxims.

507. Elemosynæ ad mentem donatoris præcipue servandæ.
 508. Clerici non ponantur in officio seculari.
 509. Communis error facit jus.

- 510. *Conditio ex parte extincta ex toto extinguitur.*
- 511. *Conditio ad liberum tenentum auferendum non nisi ex facto placitari debet.*
- 512. *Conditiones præcedentes stricte interpretandæ sed non ita de subsequentibus.*
- 513. *Conscientia legalis ex lege fundatur.*
- 514. *Consensus est voluntas plurium ad quos res pertinet simul juncta, et in criminalibus silentium præsentis consensum præsumit; in civilibus nonnunquam vel absentis et ubi ejus interest etiam ignorantis.*
- 515. *Consentire matrimonio non possunt infra annos nobiles.*
- 516. *Constructio ad principia refertur rei.*
- 517. *Constructio ad causam refertur.*
- 518. *Constructio est secundum æqualitatem rationis.*
- 519. *Constructio est secundum æquitatem.*
- 520. *Consuetudo semel reprobata non potest induci.*
- 521. *Incertum ex incerto pendens lege reprobatur.*
- 522. *Contractus ad mentem partium verbis notatam intelligendus.*
- 523. *Corpus humanum non recipit æstimationem.*
- 524. *Cui licet quod majus non debet quod minus est non licere.*
- 525. *Quod dubitas ne feceris.*
- 525*. *Descensus tollit intrationem.*
- 526. *Designatio unius est exclusio alterius.*
- 527. *Expressum facit cessare tacitum.*
- 528. *Patefactio rei trahit ad se remedium.*
- 529. *Deficiente uno non potest esse hæres.*
- 530. *Dispensatio est mali prohibiti provida relaxatio utilitate communi pensata.*
- 531. *Distinguenda sunt tempora.*
- 532. *Dolus versatur in universalibus.*
- 533. *Dona clandestina sunt semper suspiciosa.*
- 534. *Donatio Principis intelligitur sine præjudicio tertii.*
- 535. *Equitas naturam rei non mutat.*
- 536. *Æquitas liberationi & seizinae favet.*
- 537. *Expressio illorum quæ tacite insunt nihil operatur.*
- 538. *Feodum simplex ex feodo simplici pendere non potest.*
- 539. *Scire proprie est rem ratione & per causam cognoscere.*
- 540. *Fictio cedit veritati.*
- 541. *Filiatio non potest probari.*
- 542. *Flumina & portus publica sunt.*
- 543. *Parcenarii fortunam faciunt judicem.*
- 544. *Fraus est celare fraudem.*
- 545. *Frustra expectatur cujus effectus nullus sequitur.*
- 546. *Libertatis est sui quemque juris dimittendi ac retinendi esse dominum.*
- 547. *Hæres est eadem persona cum antecessore.*

548. Donatio ex charta non fit ei qui non est pars chartæ nisi per remanere.
549. Hæredi favetur.
550. Qui non peccavit poenam non feret.
551. Qui testamenti ex parte beneficium vult universo assentire tenetur.
552. Ignorantia juris sui non præjudicat juri.
553. Ignorantia facti excusat.
554. Simplicitas est legibus amica ; vis & fraus invisissima ; nimia subtilitas suspecta.
555. Incerta pro nullis habentur.
556. Incidentia rei tacite sequuntur.
557. Incivile est nisi tota sententia perspecta de aliqua parte judicare.
558. In testamentis ratio tacita non debet considerari.
559. Durum est per divinationem a verbis recedere.
560. Judicium est iis quæ pro religione faciant favere etsi verba desint.
561. Judices recenter & subtiliter excogitatis minime favent contra communem legem.
562. Jura ecclesiastica sunt limitata.
563. Jura naturæ sunt immutabilia.
564. Summa charitas est facere justitiam singulis & omni tempore quando est necesse.
565. Justitia liberalitati prior.
566. Jus accrescendi inter mercatores locum non habet.
567. Rex est mista persona.
568. Fundi non debent inalienabiles esse.
569. Lex neminem cogit ostendere quod nescire præsumitur.
570. Perpetuitatibus lex obsistit.
571. Lex minori per jus quam majori per injuriam potius favet.
572. Fractionem diei non recipit lex.
573. Lex contra id quod præsumit probationem non recipit.
574. Lex vult potius malum quam inconveniens.
575. Linea recta semper præfertur transversæ.
576. Malum quo communius eo pejus.
577. Error placitandi æquitatem non tollit.
578. Moneta est justum medium & mensura rerum commutabilium.
579. Multa transeunt cum universitate quæ per se non transeunt.
580. Negatio destruit negationem.
581. Negatio non potest probari.
582. Nemo est hæres viventis.
583. Districcio non potest esse nisi pro certis servitiis.
584. Non valet impedimentum quod de jure non sortitur effectum.

585. Pacta privata publico juri derogare non possunt.
 586. Pendente lite nihil innovetur.
 587. Personalia transferri in alium nequeunt.
 588. Possessio terminum tenentis, possessio reversionarii est habenda.
 589. Propinquior excludit propinquum; & propinquus remotum; & remotus remotiorem.
 590. Quæ incontinenti vel certo fiunt inesse videntur.
 591. Quæ non valerent singula juncta juvant.
 592. Quicquid solvitur solvitur secundum modum solventis & secundum modum recipientis recipitur.
 593. Quod tacite intelligitur deesse non videtur.
 594. Simplicitas legibus amica.
 595. Statuta ita interpretanda ut innoxiiis ne obsint.
 596. Nullum simile est idem.
 597. Traditio loqui facit chartam.
 598. Verba currentis monetæ tempus solutionis designant.
 599. Verba relata hoc maxime operantur ut inesse videatur.
 600. Veredictum in lege æquitati objicitur.
 601. Ubi concurrunt commune jus & jus scriptum communi juri standum.
 602. Cum confitente mitius est agendum.
 603. Cui plus licet quam par est plus vult quam licet.
 604. Gravius est æternam quam temporalem lædere majestatem.
 605. Satius est petere fontes quam sectari rivulos.
 606. Uno absurdo dato infinita sequuntur.
 607. Non morbus plerumque sed curatio neglecta interficit.
 608. Æstimatio præteriti delicto ex post facto nunquam crescit.
 609. Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ fortiatur effectum interveniente novo actu.
 610. Actus incæptus cujus perfectio pendet ex voluntate partium revocari potest; sin ex voluntate tertiæ personæ vel ex contingenti revocari non potest.
 611. Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non solcitur.
 612. Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.
 613. Nimia subtilitas in lege reprobatur.
 614. Veritas est justitiæ mater.
 615. REX EST PATER PATRIÆ.
 616. Male res se habet cum quod virtute effici debeat id tentatur pecunia.
 617. Nulla res vehementius rempublicam continet quam fides.
 618. Summi cujusque bonitas commune perflugium omnibus.

619. Ne licitatorem venditor apponat.
620. Ne in crastinum quod possis hodie.
621. Quod civile jus non idem continuo gentium; quod autem gentium idem civile esse debet.
622. Actio casus apud nostrates ea est quâ ut inter bonos bene agier oporteat & sine fraudatione.
623. Fraus adstringit non dissolvit perjurium.
624. Qui statuatur aliquid parte inaudita altera æquum licet statuerit haud æquus cluet.
625. *ÆQUUM ET BONUM EST LEX LEGUM.*
626. Beneficium non datur nisi officii causâ.
627. Conditio partim extincta in omnibus extinguitur.
628. Mandata legis ad literam casu aliquo impossibilia proxime ad mentem legis exsequenda.
629. Conditio neminem juvabit nisi qui pars fuerit aut privus.
630. Conditio liberum tenementum cassans non per nuda verba sine chartâ valebit.
631. Conditiones præcedentes ad normam legis severe exigendæ; aliter de subsequentibus ubi æquitati licet damnum rei infectæ pensari.
632. Conscientia legis ex lege pendet.
633. In actis publicis collegii sive Corporis alicujus corporati consensus est voluntas multorum ad quos res pertinet simul juncta.
634. Eadem mens uniuscujusque præsumitur quæ est juris, quæque esse debeat; præsertim in dubiis.
635. *VITA REIPUBLICÆ PAX ET ANIMUS LIBERTAS ET CORPUS LEGES.*
636. *ÆQUITAS VERITATIS FILIA, BONITATIS ET JUSTITIÆ SOROR.*
637. In brevi aut chartâ generalia præcedunt specialia sequuntur.
638. Qui ab alio derivatum jus habet non alia lege obtinebit ac is unde derivatum est.
639. Qui ex parte testamenti aliquid donatum accipit universo testamento stabit.
640. Ad electionem non cogitur qui statim mortuo testatore eligere non potuit.
641. Lex hæreditates liberas esse vult non in perpetuum astriclas.
642. Incidentia nolunt separari.
643. Qui libenter, & sæpe, & parvula de re juramento se obstringit, perjurio proximus est.
644. Conditiones quælibet odiosæ; maxime autem contra matrimonium & commercium.
645. *MALUM QUO COMMUNIVS EO PEJUS.*
646. Quod

646. Quod nullo interno vitio laborat at objecto impedimento cessat remoto impedimento per se emergit.

647. Ubi diverso jure in eandem rem venire quis potuit eo jure venisse præsumitur quod fortius ac melius sit.

648. Si mulier, per matrimonium nobilis, nupserit ignobili definit esse nobilis.

649. Terminus et feodum non possunt constare simul in una eademque persona eodem jure.

650. Prætextu legis injusta agens duplo puniendus.

651. OPTIME CONSTITUTA RESPUBLICA QUÆ EXTRA
BUS GENERIBUS REGALI OPTIMO ET POPULARI CONFUSI
MODICE NEC PUNIENDO IRRITET ANIMUM IMMANEM AC-
VERUM NEC OMNIA PRÆTERMITTENDO LICENTIA CIVES
DETERIORES REDDAT.*

* Ex Ciceronis Fragmento.

A TABLE

A
T A B L E
OF THE
PRINCIPAL MATTERS

Contained in this Volume.

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J. W. being a clerk to the plaintiff, a brewer, " and receiving money from the plaintiff's customers, to the use of the plaintiff, and also negotiable notes in the ordinary course of the plaintiff's trade, for the use of the plaintiff, " paid several sums ascertained in the verdict, and amounting in the whole to 459l. 4s. 6d. to the defendant upon chances of the coming up of tickets in the state lottery of the year 1772, contrary to the act of parliament of " the

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" the said year. The plaintiff had given a release to his
" clerk, and to the sureties of the clerk, for the said money,
" no part of which came to the plaintiff's use, and not re-
" turned upon demand. Verdict for the plaintiff, subject
" to the opinion of the court upon this foregoing case."
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his business as attorney, because he gains credit as an offi-
cer of the court; and therefore the court may call on him
as such, to rectify misconducts which he may have com-
mitted acting under that credit, though he acted not as at-
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Attornies names to be entered in a book, and their place of abode, or such other place where he may be served with notice; and service at the place where he was last entered shall be good service; such other place was meant in case attornies had not a settled residence in town. 357.

Attorney shall not be called to answer matters of the affidavit, where the charge imports a mistake, not a crime. 618.

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Submission to an award, its strength. 426.

Cannot be affected after the time limited by the statute. 437.

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Bail.

Notice that *A. B.* and *C.* or two of them will justify bad. 26

It is usual to require four bail in felony; but it appears to be in the discretion of the court to take fewer if they think them sufficient. v. 50.

Cannot justify upon effects abroad out of reach of the process of the court. 34. 147.

Parish of their residence is too wide a designation in notice of bail. 72. 194.

Irregular notice does not make bail bad; but entitles to farther day to justify. *ibidem*.

Not present at the sitting of the court, must wait until the rising. 88.

If property of the bail be sufficiently proved to the extent in which they are to justify, the value of the house rented by bail is immaterial; for the only purpose of knowing whether they have an house is to see that they have a fixed residence. 148.

No sheriff's officer or person concerned in the execution of process shall be bail. 153.

Described a hatter, discovered to be servant to a hatter, and living in a separate house; the court rejected him. 187.

Bail surnames omitted; time given to justify. 187.

Not knowing in how many actions, or for what sums he is bail—to be rejected. 194.

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It is not a ground to reject bail that he has not been assessed to the poor's rate ; for it is only evidence of his being an house-keeper. 328.

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Bail goes no farther than security in the original action. 545.

A man brought up as an accomplice of felony, the principal not taken, may be bailed. 554.

Motion to discharge bail on a commission of lunacy issued against the principal not good. 617.

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Secret trust against him who has open legal title will not affect the bank. 66.

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1. **Commissioners** have a right to enquire whether one who comes in to prove a debt under a commission means to proceed at law. 52.
2. **A.** has an estate to his wife for life ; remainder to himself for life ; remainder to his issue by the wife ; remainder to himself in fee : With power of revocation in himself. The wife dies without leaving any issue of the marriage. **A.** commits

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commits an act of bankruptcy, the assignees have the estate: And so it seems they would have had if the bankruptcy had been committed and commission issued in the life of the wife; for the act of bankruptcy would have been a revocation. 71. And if it was a power dependent on a contingency the assignees took the contingency. 71.

3. Held that inspection of the proceedings shall not be granted before the trial to a bankrupt who means to litigate; but at the trial the clerk of the commission shall attend.

But creditor shall have inspection. 80.

4. Agreement to keep execution secret, and that the person against whom it is executed shall retain the goods is not an act of bankruptcy, where the execution itself is adverse, but is void against the creditors. 121, 122.

An act of bankruptcy is a crime by positive law, and must not be extended by construction to a mischief against which provision was not made.

5. Whether an innkeeper sending out wine deals as a chapman within the statute is proper to be left to the jury upon the quantity. 118.

6. Farmer not a trader within the statutes of bankrupts. 323.

Wherever a man is a trader within any of the statutes of bankrupt it is actionable to say he is not worth a groat. *ibidem*.

7. The statutes of bankruptcy, perhaps, do more mischief than good; but whilst they continue courts of justice must decide according to them. 341.

8. Bankrupt may not give money to a creditor to obtain a certificate; but if he has given it the law will enable him to oblige the creditor to refund. 345. v. Contract.

9. The parties who have proceeded as in case of a bankruptcy are concluded from saying, to the prejudice of others, that there was no bankruptcy, but it was a matter concerted between them. 427.

10. Certificate pending suit operates in nature of release. 437.

11. *A.* being a creditor of *F.* and Co. gives farther credit for 7000*l.* which he borrowed for the support of the shop, and which was to be replaced in six days, being lent during the holidays.

Before the time fixed, and without demand, *F.* sits up all night, and writes the following letter to *A.* the creditor.

“ Mr. *F.* conceiving that the money lodged with him was a
 “ sum about which, perhaps, even some pains had been taken
 “ to place it there, and that disputes might arise, gives
 “ that preference to Mr. (*A.*) which he thinks undoubtedly
 “ his due.”

Two notes inclosed—one for 5,500*l.* the other 1,700*l.*

He gives this letter to his (*F.*s) clerk, to carry to *A.* the creditor, and at four in the same morning absconds. The same day

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day the commission issued. The letter was not delivered till two days after, and which besides was a day before the day of payment.

12. Determined, that if by deed this preference, though honest and meritorious if it had been in his power, would, under the circumstances of this case, have been itself an act of bankruptcy in *A.* 2d, that it was void, as against the other creditors, being a countermendable action till delivery at least, and before delivery countermanded by the act of bankruptcy.
13. That had it been in the regular course of payment; had legal diligence and solicitation been used by the creditor to obtain it; had the notes been sent to ward off an execution issued against the debtor, without fraud or collusion; it would have been good.
14. But here it was bad; and would have been, even if the act had been complete before the bankruptcy; being done in immediate contemplation of an act of bankruptcy to be committed by the doer, and done with a design to deprive the other creditors of that benefit of an equal distribution of all the bankrupt's effects, to which the law entitled them.
15. That it was not necessary to make it void that it should be an assignment of the whole: That an assignment of the whole must, indeed, either be under a fraudulent trust, or stop all trade, and produce an immediate bankruptcy; but an assignment of part might be void as against creditors, though it were not, upon the circumstances, as an act of bankruptcy.
16. That farther it was bad and void, it not appearing on what consideration, or for what debts the notes were paid; and because *A.* the creditor was not bound to have accepted them as payment; and because the express declared purpose was void.
17. To which it was added, that the sum of the loan and of the notes differed, one amounting to 7000*l.* the other to 7200*l.* and that, upon calculation, it could not be for interest. 472 to 490.

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Difference between bar and presumption against a title. v. 505 to 8. 589.

Twenty years quiet and peaceable possession shall be a bar to informations in the case of corporation elections. 553.

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Debt is the substance, penalty the form of recovery. 361.
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Bribe.

If I lay a person five guineas he will not vote for me, this is a bribe. 552.
He who employs an agent for the purpose of bribing cannot recover the money given to the agent for that purpose. v. *Illegal Contract*.
A person who has taken the oath against bribery may be witness of the bribe given.
It seems also the briber may recover against the bribee; for in doing this he subverts the illegal contract, which the law will permit him to do, though not to maintain it. v. *Illegal Contract*.

Bridges.

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When it does not appear who should repair it is upon the inhabitants of the county for 300 feet beyond the bridge—and the statute giving jurisdiction to the justices in their sessions does not take away the common law jurisdiction of the court of B. R. in this case. 239.

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Settling of cases, the order and dispatch to be observed in it. 82, 83.
As a case is settled before a jury so it must stand. 83.
Putting off by consent not to be allowed without good cause. 83.

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Grandchildren take by implication, as children. v. *Pitt v. Harbin.* p. 19, 20.

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Supports morality. 385.

Is the best bulwark of every man's liberty and property. v. the case of General Warrants, and p. 378.

Is the asylum of the good and just; but not of wrong-doers, to protect their wrong. 382.

Composition.

Upon penal statutes the court will admit cautiously, to avoid collusion. 372, 395, 400.

Condition v. Covenant.

Consequential Damages.

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Consolidation of Causes.

Where there is an agreement that several causes shall abide the event of one, such event is to be understood as shall do justice to the full satisfaction of the court. 147. 151, 152.

Conspiracy.

In an indictment for a conspiracy it is not necessary to prove an actual conspiracy or express malice; but conspiracy and malice are to be inferred from the circumstances of the fact, according to the law upon it.

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Contempt.

Where there are faults on both sides, and the officer executing process has behaved unjustifiably as well as the parties who resisted him, the court generally will not grant extraordinary process of contempt. 36.

Contract.

If *A.* has a slave in *Virginia*, or any country where slavery is established by law, and enters into a contract with *B.* (both *A.* and *B.* then being in *England*) that he will sell him this slave, the court here will give *B.* his remedy on action upon breach of this contract. 17.

But where the person of the slave himself is the object of the action, that person, if he be in *England*, is under the protection of our laws here, and the master shall not use him as his slave, nor recover him by action as his slave. *v. Negro v. S.* 19.

Where a person comes to demand upon an illegal contract to have the performance of it, he shall not be assisted; but where he comes in subversion of the contract, the law will relieve him, though *particeps criminis*. *v.* 345.

Vide *Assumpsit*.

Construction of Words in a Will.

“ Estates for the purchase whereof I have already contracted and agreed :” Held that purchased estates would pass under this devise as well as estates in contract. *v. Will.* p. 113. *B. R. contra* in the Common Pleas, and *v.* p. 349 to 351.

Where words of locality are used estate is restrained from signifying the entire interest of the owner, which it might otherwise impart to a life interest given by him out of the thing so described by its local situation. *v.* 224.

Devise of an house to seven persons, equally to be divided amongst them, passed an estate of inheritance, because otherwise the devisees could take no such benefit as seemed intended for them. 223.

The best rule in the construction of wills is to find the general intent; and then, as much as grammar and language will permit, to interpret particular expressions accordingly. *v.* 270.

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Consideration.

What is simply a good consideration;
What valuable;

What

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What fraudulent or voluntary. v. 216 to 218.

Goods sold to C. in consideration that A. promised B. the vendor, that, if C. the vendee, did not pay, he A. would.

Determined that the vendor could not come upon A. for payment till they had used diligence to have the debt from the person first liable. 769, 770.

But the court would not say whether on this case they could have come against A. then. 770.

Where before delivery A. says to B. "you may deliver the goods to C. I will be your paymaster," A. is the original debtor; but there is a nicety where he says, "if he does not pay I will." 770.

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Must agree with the affidavit that supports it. 184.

Does not hinder evidence till a man be attainted by judgment. 376.

Copyhold.

The tenant by admittance is only according to the quality of his estate: And the lord, through his steward, only an instrument to convey. 390.

Custom of copyhold. v. 398.

Corporation.

The court will not intend any thing to make an election void after an acquiescence of many years. 44.

That the mayor of common right has no casting vote, but must maintain his claim to it by charter or usage. 315.

In a charter to a corporation words in restraint of trade are very unfavourable, and where they are doubtful the court will take them in that sense which makes least against the liberty of commerce: Even where they are clear the court

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will presume a renunciation of such privileges, where there is no evidence of usage to support them. 334, 339.

After a distance of time the court will not try rights of persons elected when the evidence is probably lost, and the question turns on a point of fact, and by annulling the elections the corporation, consisting of a definite number, might be extinct. 519. Otherwise where a question of law, and the burgesses indefinite. 519.

Held that an infant might be chosen, but could not be admitted till of age. *ibidem*.

By prescription presumes a charter. 558.

Costs.

In ejectment where judgment against defendant by default no costs; because the defendant is nominal: But you may bring an action in consequence of judgment to recover mesne profits and costs. 451.

Costs partake of the nature of the original debt. 617.

Costs out of pocket the largest costs. *ibidem*.

Costs in full where party will not admit fact not tending to the merits but form only and creates great expence. 248.

Counts v. Pleading.

Plaintiff counts that defendant, being sheriff of M. suffered the plaintiff's debtor to escape—*per quod* he lost his debt.

2d, That defendant, being sheriff, *ut supra*, might have arrested the plaintiff's debtor, and did not.

Judgment for the plaintiff in C. B. Error for repugnancy of the counts. Judgment affirmed. 69, 70. v. Maxim.

Courts.

Every court ought to maintain its own jurisdiction, and mutually each others. v. 160.

Covenant.

Lessee covenants to leave sufficient compost on the soil of the landlord at the end of the term, he, the lessee, having the yard, barn, and a room to lodge in, and dress diet. This is a mutual covenant, and not a condition. 57.

Plaintiff covenants to be the defendant's hired servant for a year and a quarter, and that he, the plaintiff, would pay at the expiration of the term 200l. and that at the end of the term he, the defendant, would surrender his trade and business

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ness to J. P. the plaintiff's nephew, or such person as the plaintiff should appoint; and thereupon breach assigned, "that he did not surrender, &c."

Seven different counts pleaded to this by the defendant, of which five went *en pais* to a jury, and two were in demurrer at law.

The principal in demurrer was, that plaintiff did not find sufficient security for the payment of the sum stipulated.

The finding the security is a condition precedent, to be first performed before the plaintiff was intitled to the surrender. 198.

Independent covenants cannot be set off against one another. *ibid.*

Reciprocal covenants are where one is to do such an act, the other doing such an one, and both are simultaneous. There each is to be ready to do his part before he can come against the other. *ibid.*

Where covenants are ill arranged the court will marshal them according to the intent and nature of the contract. *ibid.*

And whether condition is precedent or not is to be learned from the nature of the transaction and meaning of the parties. *ibid.*

Covenant to secure possession is generally to be understood against disturbance by lawful title: For the covenantee may have trespass for unlawful disturbance, and the law will not intend that another covenants to do for him what he can do and ought to do for himself. 460, 461.

Coverture.

Advantage not allowed upon motion of evidence offered to prove that the defendant was a married woman, in order to obtain a discharge from arrest; but if she had any thing of this kind, whereof she might avail herself, she was left to plead it. 228, 395, 396.

Creditor.

His interest in administration bond. v. 622 to 628.

Custom.

There is a distinction where the custom is pleaded as a defence to the action, and where as a ground of the action. 138.

When a feme covert, by the custom of London, has authority to trade as a feme sole, and enters up judgment as a feme sole, it does not appear that this extends to empower her

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her to contract a debt by bond without her husband, and the debt ought to appear to have been in the course of her business, as a sole trader, and not otherwise, and she cannot give a warrant of attorney to enter up judgment upon her debt, as sole trader, in a court of common law, without her husband's name being joined, nor can she sue or be sued in a court of common law without her husband; for tho' where the right is established by custom of a foreign court the court here will give judgment according to that right, yet the form of recovery must be according to the course of proceedings in the court in which you sue for judgment.

And indeed it did not appear that, even by the custom in the city, in the case before the court, she could have sued or been sued in the city courts without using the name of her husband for form, though for his security he was not to be charged with her debt, contracted in her separate trade.

Of merchants, vide Merchants.

Custom-House.

Held *Easter* term, 13 G. 3. that custom-house officer had not a right to a second gauging of a vessel before he granted a permit. v. 204 to 205.

Damages.

EXCESSIVE. See *Verdict*.

300l. for breach of promise of marriage given.

Damages to be estimated according to the rank and ability of the offender, the nature of the offence, and the circumstances aggravating or extenuating. *ibid*.

Where damages are given not beyond the declaration, nor for matters not within the action, the jury are the proper judges, and the court will not incline to unsettle them; unless the matter admits of a certain estimation, and the jury have violently and extravagantly exceeded it: But where the cause is an injury to person or reputation there is no certain measure of damages, and the jury ought to decide. 773, 774.

Debt.

Vide Insolvent Act.

Declaration.

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Declaration.

To whom to be delivered. v. Delivery.

Before appearance declaration *de bene esse*. 333.

Declaration against a corporation for not repairing banks of a navigable river, as from time immemorial they had been used and ought, whereby the course of the river became obstructed, and the plaintiff was obliged to carry his corn about: 2d count charging as above, and that thereby he had not sufficient use of the navigation, *prout consuevit & debuit*. Judgment for plaintiff affirmed on error. v. 556 to 558.

V. Evidence.

Deed.

On valuable consideration shall be construed liberally; especially where on a marriage settlement, and in favour of issue, 33.

Held that the court would reject words or supply words to give effect to such a deed, according to the intent apparent from the words and nature of the conveyance. 33, 34.

Difference between a will and a deed is, that technical words are required in a deed, which are dispensed in a will; but in both the intent must be equally preserved. 34.

Deed of covenant in consideration of marriage; estate for life to the husband and wife; covenant to renew leases for the benefit of the issue, in which leases the name of the wife is always to be one during her life; and in case either of the *cestuy que vies* (the husband and wife being two of the first) became sick or infirm the husband to renew such lease or leases.

Determined that on the death of the husband the executor should renew, and so *toties quoties* during the life of the wife, the survivor. 86.

Delivery of deed. v. Delivery.

You cannot go into evidence that a deed absolute upon the face of it was in truth conditional. 457 to 460.

But there may be such fraud as will vitiate it, *ab initio*, and this it seems would be good evidence on a plea of *non est factum*. *ibid*.

But if there is an agreement subsequent to the deed, or at least not contained in it, though you cannot aver it against the deed, the court will let you in to have justice some other way. *ibid*. v. Construction, Consideration, Habendum, &c.

Delivery.

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Delivery of a deed may be by words or actual tradition of it. 340. v. Feme. 3.

Where goods countermanded by act of bankruptcy before delivery. v. Bankruptcy. 12. And v. p. 484, 487.

Deviation.

There is no certain line to be drawn what shall be deviation; but it depends upon the circumstances. 421 to 423.

Devise.

Bad in original can never afterward be made good. 161.

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Ejectment.

Notice of ejectment must be fair and honest, and fairly and honestly interpreted to the tenant in possession; otherwise it will serve only to inform the person who uses it deceitfully that nothing is so silly as cunning. 53.

Embroidery.

Made up into wearing apparel, and seized on landing, held not within the statute of 22. G. 2. so as to be liable to the penalty. 200 to 201.

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Held to be necessary only to save a fine. 360 to 362.
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Declaration on. v. 358.

Estoppel.

Suit against a woman by the name of *Clarissa*: She puts in bail in that name; she shall not plead, in abatement of the action, that her name is not *Clarissa* but *Clara, Elizabeth*. 82. v. Abatement, Bankrupt, Fraud. Feine. 3.

Evidence.

The best must always be had of which the case will admit. v. 328. 363.

Copy from the minute-book of the House of Lords good evidence. 387, 428, 429.

Where a deed is lost or destroyed without the fraud of the party who desires to prove title under it, evidence shall be admitted of its contents in the best manner that it can, that there may be no failure of justice: But first you must prove such a deed once existed, and is lost; and you must prove contents, not identically indeed, but as well and truly as you can. 507.

Must agree with the declaration, in order to entitle to a verdict. 523, 524.

All evidence is to be weighed according to what is produced on one side balanced against what is produced on the other. 528. And to the subject to which it applies. 589.

The jury are to find the evidence, not the court. 573.

Presumption is a ground of evidence, and therefore it is for the jury, but not the court. *ibid*.

Examinations.

Where a conviction is removed by *certiorari* the justices are not ordered to return examinations; nor is it done but in the case of a coroner's inquest, where the court, as supreme coroner of the kingdom does it. 348.

Exchange.

Estates passing in exchange must be reciprocally of equal quality. v. 416.

Cannot be between more than two parties. *ibid*.

Bills of. v. Bills of Exchange.

Executor

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Executor.

- Payment of interest evidence of assets against an executor, but not conclusive evidence. 68, 69.
Will before probate sufficient title to the goods; probate only necessary to enable him to sue for debts. 81.
Feme possessed of chattels *in auter droit*, as executrix, the husband shall not take them by gift of law though he survive her. 83.

Execution.

- Never to be taken out but for what is actually and *bona fide* due. 280.
Of goods hastily and unreasonable disallowed. 52.
Levied by attorney after debt satisfied. Goods ordered to be restored with costs. 84.

Exportation.

- The exportation price of barley held to be determined by the price at the port of exporting. 554.

Felony.

- Taking out letters of administration to seamen upon false oath. 321.

Feme.

1. May plead without her husband where the husband is transported: For transportation is a temporary death. 142.
 2. Warrant of attorney to confess a judgment given by a feme sole; she afterwards married: The court gave leave to enter up the judgment in the name of the husband and wife. 329.
 3. May affirm a deed which was void, being made during her coverture, and make it good when she becomes sole by re-delivery; or by words or acts of affirmance, without actual delivery. v. 763 to 766.
- Feme sole marrying between original process and appearance. v. Abatement.
Vide Coverture, Marriage, Revocation.

Fine.

- Fine levied by tenant for years is no bar to the freehold. 514.

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Final Jurisdiction.

Where a sentence is made final by act of parliament, or otherwise, it is to be understood with the reserve if it be not palpably unjust or illegal upon the face of it. 189.

Where a sentence has been passed not unjust or illegal but improper, by a court having final jurisdiction, another court, though superior, may not set it aside: But it will influence the discretion of the court when their assistance is asked towards the execution of it. 190.

Foreign Judgment.

You can't bring an action upon a foreign judgment as judgment; but you may action of debt, and give the judgment in evidence. 148.

Foreign Laws.

Where a contract is made abroad, grounded on foreign law, the court here will receive evidence of that foreign law, and give judgment accordingly, on an action brought here in due form upon the contract, 154.

Fraud.

If a charge is simple, and the denial coupled with circumstances, it is a great presumption of fraud. 155.

The very title and ground of the statute of frauds has been the reason of many exceptions from the letter. 331.

Every construction of the statute of frauds which would be good in equity will be good in law. 331.

The note of an agent will be the note of the party, so as to take it out of the statute: Though the agent has not an express authority to sign, but a general authority. 332.

A false or collusive action shall conclude against the parties to the fraud; but all the world besides is permitted to controvert it. 427.

Fraud, in the legal sense, is any act unwarranted by law prejudicial to third persons. 476. v. Bankruptcy.

Vide more under Insurance, Consequential Damages, Malice implied.

Rules concerning fraud of two kinds; one to protect good and innocent people, at least comparatively innocent to those who have deceived them, by rescinding fraudulent agreements.

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The other to prevent persons dealing upon equal terms from falling into agreements prohibited, by precluding them from taking relief against such contracts. 758.

Where the offence is *pari gradus* the defendant has the better side.

Whoever enters into an illegal contract does it subject to all rights known or unknown at the time, which are against the contract. 759. v. Owner.

Where a woman has passed as a married woman, and given herself out as such, and been accordingly reputed, and has goods in the house of the man with whom she cohabits, and is ostensibly his wife, and the goods ostensibly his, neither he nor she shall say, upon the goods being taken in execution by a creditor for a just debt, that she is not his wife, and the goods not his. 782 to 784.

Secret transfer of moveable goods always a badge of fraud. 784.

Game Act.

Keeping a greyhound, without using him for the purpose of destroying the game, not within the act. 179.

Going out with a qualified person not within the act. *ibid.*

Gaming.

1. An evil too big for positive law. 152.

Well when both parties lose by it. *ibid.* and 153.

2. Securities on a gaming consideration coming into the hands of a third person innocent, without privity, for a *bona fide* debt, are yet void. 755.

3. Insurances on the chances of tickets coming up, prohibited. v. 776.

General Warrants.

Vide Warrants.

Grammar.

The proper and legal construction of what is commonly called the preterit tense. 440.

Grandchildren.

Vide Children.

Habendum.

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Habendum.

Limits, enlarges, ascertains, and fixes the meaning of the premisses, but cannot contradict them. 191, 192.

Heir.

Cannot be of the half blood. 396 to 398.

Formerly this was otherwise, and the heir by the half blood might inherit of lands by descent from the father, though not by purchase. 396. v. Prerogative.

The heir shall not be disinherited but by necessary implication. Vide *Will et passim*, and v. Implication.

Holding over.

If an action be brought on the statute for double rent for two years holding over, the jury may find for so much as, upon the evidence, the tenant appears to have overheld beyond the term, provided they find not beyond what is laid in the declaration. 276.

House.

Every man's house is his castle. v. the case of General Warrant.

This maxim confined to those whose domicile it is ; for it is not the sanctuary of a stranger.

Held that the privilege of the door belongs to the outer door, and not to the other doors, though of the separate apartments of lodgers. 382.

The maxim not to be extended by any latitude of construction against arrests upon legal process. 382.

Houses.

Disorderly, the source of evil, public and private. 275.

Implication. (Necessary.)

Explained to be a certain and undoubted implication ; but not such as left it strictly impossible to be otherwise. 444.

Implication of malice. v. Malice implied.

Indictment.

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Indictment.

Setting forth that on such a day plaintiff was a justice of peace, and that the defendant at a sessions holden at *B.* for the county *A.* then and there said such words, bad for want of certainty of time. 129.

That two may be included in indictment for an assault against two. v. 271.

Where in an indictment by the accidental omission of a letter a sensible word is made insensible, though in the very gist of the charge if the jury may be clear of the meaning, held that it shall not vitiate the indictment; otherwise when one word which has a meaning, though improper and nonsensical in the place is substituted for another. 785, 786.

Injunction.

Does not determine the title or merits; but is to stay present waste or mischief *pendente lite*. 149.

Insolvent Act.

A. owes money to *B.* and *C.* is discharged under the insolvent act; and gives a note to *D.* trustee for the benefit of *B.* this is no extinguishment of the old debt and creation of a new; but an additional security for the old: And the person of the debtor remains free under the benefit of the act. v. 37.

Court never grants the insolvents less than the full allowance, which is in their discretion by the statute. 348.

Where a person has a beneficial post though not strictly assignable, he should do his best to dispose of it before he claims the benefit of the insolvent act. 348.

Serjeant of the militia does not seem to be a place within the insolvent act. 349.

Time of payment on Monday, is put by way of instance in the act; another day will do, provided it be weekly. 349.

Debt due before discharge, but to be paid after he is discharged by the act. v. 433, 434.

It seems the place of waiter to the commissioners of the customs, is not within the act. 436. *sed quare*.

Held that attachment for non-payment of costs in a criminal suit on 5 *W. M. c.* 11. was discharged by the insolvent debtors act. 650.

Information.

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Information.

Court will not grant information upon doubtful evidence. 65.
Party applying for an information against another, should come pure hands. 73. v. Maxims. v. 148.

The court will not assist a complainant in an extraordinary way, where he has been obliged to do that justice he ought to have done himself, though irregularly obliged, and has been the cause of the act complained, and it does not appear to have been done *malo animo*. 147.

Not proper to be granted in the case of a very poor person. 155.

Not proper to try a civil right; unless the parties stand out against a trial at law. 184.

Court will not grant an information when the matter charged, if proved, will amount to a felony which ought to be tried in the course of common-law. 253.

He who applies for an information must not have lain behind. 273.

Upon a motion for an information, the original papers should not be annexed to the affidavit; but a copy.

Court will not grant it where information is offered under false or ambiguous colours; where the words fairly admit a favourable interpretation; where the complainer comes late; where he comes equally chargeable; where the party charged is so poor that he would be overborne by the expence; where the matter itself is not of importance, for public example in an extraordinary manner. Vide the places cited above, and p. 393, 394.

Will be granted against papers published to prejudice a cause. 465.

Insurance.

Where a person insures and afterward the vessel is lost, and he writes after the loss to increase the insurance, and the letter is dated on a night where no post goes out from the place, and the next day in the public papers of the place, the loss appears, and the person applying to increase the insurance, does not withdraw the letter nor give notice of the loss, this is so suspicious, that in a case with these circumstances where there had been a verdict for the defendant, who obtained the increased insurance, the court granted a new trial. 212, 213.

In November 1722, *A.* chartered the ship *Thomas and Matthew*, and agreed to freight her for Seville, and back again.

The plaintiffs and many others shipped a cargo on board and insured the same, with provisions against loss by storms and perils of the sea, &c. and against barratry. In the policy

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policy it is declared, that it shall not be void by reason of any flaw in the vessel unknown to the assured.

The ship sailed in December 1772, and went to Guernsey, where the captain took in a quantity of brandy, which he meant to run by way of clandestine trade; the night following they sprung a-leak, which drove them into Dartmouth, from whence they went to ——— in Cornwall, where the brandy was seized by the authority of the custom-house.

By the bad weather, &c. the ship was rendered unfit for the voyage, which had been partly prosecuted after putting into Cornwall.

The parties came to an agreement that the insurance should continue, and protect their goods in their return to London.

The goods were spoilt whereupon this action was brought. Three counts were laid.

First of damage to the ship by storms, &c. whereby the goods were spoilt.

2d. Of the ship springing a-leak in her voyage from Dartmouth, whereby, &c.

3d. That by the fraud and barratry of the master the goods were spoilt.

The underwriters contended that this was only a simple deviation of the captain, not fraudulent as against the owners, and was neither merely accidental nor barratry, being no fraud against the owners.

The insured insisted that it was either accidental loss, and then they were entitled to recover under the general terms of the insurance against storms, &c. or else it was barratry.

It came out upon the trial, and was found by the jury under the direction of the judge, that the voyage of the captain to take in the brandy was with the privity of *Willes* the owner of the hulk, but without the privity of *Darwin* who chartered the vessel.

And they found a verdict for the plaintiffs.

On a motion for a new trial, the court was of opinion that the verdict was right.

What was charged on the captain and found, it was agreed, could not have been barratry as under the insurance, if it had been with the privity of the owner, for he should not have recovered against his own order or consent; but that here *Willes* was not the owner; but *Darwin* who freighted under the charter party was the owner, *pro ista vice*.

That barratry, in the general sense of commercial nations, and in our books as far as it had been touched, seemed to mean something fraudulent or criminal, whereby the interests of persons concerned in the voyage or in the ship were prejudiced;

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But that it was not necessary it should be a fraudulent or criminal act intended against the persons who suffered; it was enough if it was a fraud and a crime, and they sustained damage, though the damage not intended against them; And farther (though Mr. Justice *Willes* seemed to doubt, but agreed the substantial merits were answered and ought not to be disturbed) the court was clearly of opinion that the supervenient damages need not result directly and immediately from the criminal act, but that all damages afterwards happening, which might by any possibility otherwise not have happened, shall relate back to the original fraud, and be imputed as its consequences. v. 631 to 648.

Irrelevancy.

Opprobrious words, spoken by party, counsel or witness, irrelevant to the cause, will be punished. 56.

Irregularity.

May be waived if you continue the process on the other side, as if it had not been committed. 236.

On a common appearance, proceeding to plead admits regularity of the appearance. 237.

You should complain of it on the first opportunity. 323, 333.

Where there had been an irregularity, and the party who suffered by it came late and without merits complaining of surprize, the court dismissed the application, telling them that they came out of season, to inform the court they were surprized into doing justice. 333.

Where a bill is filed against one as attorney of *B. R.* who is attorney of *C. B.* this seems error, and not irregularity. 653.

Judge.

Words spoken by a justice of peace to a grand jury very improper, not subject to an indictment because spoken in the execution of his office; but if he had been a county justice, they might have a ground to apply to the great seal to remove him from his office. 56.

Words spoken by a judge in the execution of his office are not actionable. 56.

Judgment.

Where there are two defendants convicted under the same indictment for the same offence, the court will not proceed

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to judgment against one separately, unless the other cannot appear by any reasonable intendment. 44.

Suffering judgment by default, admits the fact and the law to be against you ; and you cannot offer affidavits in denial or justification, but you may to extenuate and mitigate. 82.

Judgment in *Ireland* upon a bill of exceptions ; held that it ought not to have been given ; but when given the court would not reverse it. 34.

Judgment foreign. v. Foreign judgment.

Judgment of B. R. and execution thereon set aside, the plaint in the writ being laid " before our justices at Westminster," whereas it ought to have been " before ourselves at Westminster or wheresoever, &c." p. 184.

Of corporal punishment not to be pronounced against a person in his absence. 400.

Judgment relates to the first day of term. v. 654.

Judgment Interlocutory.

A regular judgment not to be called a snapping judgment where there is no fraud. 145.

Jury.

Juryman put upon the pannel above eighty years of age, discharged by the court. 213, 214.

Justices of Peace.

The court will not suffer them to be harassed under colourable pretences. 38 to 42.

But where any thing doubtful appears in their conduct, tho' the court in a doubtful matter will intend favourably for magistrates in the trust of public justice, they will not punish the complainant with costs. v. 42.

Not protected by law in acts done under pretence or colour of office. 243.

A justice may commit on complaint, but in strict form the complaint should be in writing. 243.

He may commit on his view without complaint, if he has reason to apprehend the peace will be broken, though not actually broken. 243.

All officers acting under a justice's warrant, within the jurisdiction of the justice, are within the protection of the statute 24 G. 2. v. 252.

They must shew a just and reasonable cause for refusing licences. 315.

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May plead the general issue to actions brought against them, and give the special matter in evidence; and if verdict is for them they shall have double costs. 373.

A man who acts as attorney should not act as justice of peace; but this extends not to charter justices. 620.

For more concerning the jurisdiction of justices v. Bridges. Conviction, &c.

Latitat.

Personal service necessary in the first process in *latitat*. 253.

Larciny.

If after goods are sold, and earnest or the whole sum paid, a person takes out part, though before actual delivery to the buyer, or to any to convey to him, this is grand or petty larciny, according to the value taken out, tho' the goods may be remaining in the warehouse of the seller: For, after the sale is completed by earnest paid, the possession of the seller is the possession of the buyer. 601, 602. v. Trover and Specific Performance.

Lease.

From the first of *June* for three years begins on the second and ends on the first. 276.

Lessee.

If lessee hold over after notice from the landlord that in case of holding over beyond the day in the notice he shall pay an increased rent, the holding over is an assent to the new rent, and the landlord shall recover it in an action for use and occupation. 154.

Vide Holding over. v. Rent.

Legacy.

Double.

Where a less sum is given by will, and afterward a greater by codicil, or in general a less sum by one instrument and a greater by a subsequent, as where there are two codicils, and different sums given in both to the same person, the presumption is in favour of the devisee as to both: And if the heir would take either sum from the devisee he must

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prove an ademption of it ; and so it seems if a greater sum be given first and afterwards a lesser. Otherwise where in the same instrument, or equal sums in different instruments ; for then the proof lies on the devisee that both were bequeathed. 130 to 133.

Letters.

Where there is a post-town that town constitutes the limits of delivery ; and the master of the office there is bound to deliver letters to all persons within that town. And he cannot charge any thing beyond what is provided by the act of parliament. 753 to 755.

Vide Parliament.

Libel.

Where being in custody is not an excuse. 778 and 780.
That publisher is ignorant of the contents goes for nothing. 544. It may indeed on circumstances be a mitigation, but it cannot justify to the action. 762, 763.

The impotence of the libel, both in the writing itself and in the strength of the characters it attacks, is no excuse for it. 778.

A libel on King *William* and Queen *Mary*, especially as instruments of the revolution, is punishable now. 778.

If the meaning is clear to the jury, misdating of facts or omission of letters in words will not make it less a libel. 775. v. 780.

Liberty.

For violation of liberty no price is a compensation ; whether it be by confining a person, or beating, wounding, or otherwise ill treating him, in his body or reputation, which he has a right to enjoy freely, or by oppressing him and depriving him of his just rights, in any kind. v. 774. and v. Damages, Libel, General Warrants, Maxims, &c.

The laws of this country will not endure the violation of liberty in the person of a stranger, no, nor of a slave resident here ; for they know not slavery, nor suffer it to breathe in the air of *England*. v. Negro, and the exception of villenage, now obsolete.

Limitation of Time.

A year observed to be the common limitation in penal statutes where a moiety goes to the informer and a moiety to the poor. 330.

Vide Statutes of Limitation.

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Literary Property.

Vide Abridgment.

Madhouses.

Private, not authorized by law (note, this was before the late act). The keepers of them excused by acts of necessity under the judgment of proper persons in a proper manner. 73—75. 79.

Madman.

Any man may commit a person who, under the visitation of God, is a lunatic furiously mad, to prevent mischief. 243. But the removal of a lunatic is under a special power given to two justices. *ibid.*

Malice.

Implied. What it is, and its consequences. v. 645. and v. Insurance.

Majority.

The majority at common law is not of the whole body, but of those present. 266.

Mandamus.

Will not be granted to do that which is likely to be done without it by consent. 148.

The court refused to grant a mandamus to admit a deputy parish-clerk. 434.

Mandamus will go to restore a person removed from a freehold before it was competent to remove him. 551.

Marriage.

Bond with penalty engaging not to marry any but the obligee void, because against policy and reason; the obligee not engaging

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engaging to marry him. v. the case of *Long v. Dennis*, in Sir James Burrow's Reports, published since the page was printed which is referred to in the note above, and particularly see 2055 to 2057. And vide also the case of *Love and Peers*. 2225 to 2234, which seems the very case meant. Vide Feme.

Master.

Master may justify in assault that he interposed in defence of his servant, whom the plaintiff was beating; for the duties of the relation are reciprocal. 215, 216.

Master and Fellows.

Disputes concerning election to be tried in the King's court. v. 25.

Maxims.

No man shall be a judge in his own cause. 63.

Extreme niceties very proper in furtherance, very bad in hinderance of justice. 70. v. Table of Maxims.

Que peccat in syllaba peccabit in toto causa is not to be taken generally, and it is less to be admitted in civil causes than in criminal charges, and less in civil upon the defensive side, which is favourable, than upon the adverse, in which greater nicety should be used. 146.

1. *Apices juris non sunt jura.*

2. *Summum jus summa injuria.* v. 327, 328.

3. LIBERTAS NON RECIPIT ÆSTIMATIONEM.

4. *Cessante causâ cessat causatum.* 401.

5. *Nemo lucrabitur de injuriâ suâ propriâ.* v. 645.

6. *Allegans turpitudinem suam non est audiendus* to be taken in a restrained sense. v. 342. 757, 758.

Vide *passim*, and v. The Table of Maxims.

Merchants.

Custom of, part of the general law of nations. 639. v. Insurance.

Morality.

Whatever offends against the order and good morals of society is an offence against the law of *England*, and punishable at common law. 385.

Mortgage

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Mortgage.

Ejectment by mortgagee not considered as adverse against the tenant. 364, 365.

Motion.

What regularly is to be had on plea ought not to be taken upon motion. 65.

What is hard and unfavourable, in a view to conscience and equity, the court will not suffer to be taken upon motion. v. Gaming, 2. and v. Coverture.

Naval Stores.

Vide statutes concerning, and v. Broad Arrow.

Negro.

Cannot be sent out of the kingdom of *England* against his will. 19.

New Trial.

Will not be granted in every case where the verdict is against evidence. 146. 391, 457, 529.

To grant a new trial supposes at least that the verdict was against evidence, or the evidence improper to have been laid before the jury. 158.

Upon a new discovery never too late to move, if you apply in regular time after the discovery. 160.

Insufficiency of counts ground for arrest of judgment; not of new trial. 371.

Ought not to be granted where the charge is of a criminal nature, and the defendant has been once acquitted. 391.

The court will not grant a new trial where the jury have found against the form, though they have been wrong in so doing, if they have found according to the merits and substantial justice. 521.

Non-Residence.

Sequestration of the benefice no excuse. 602, 603. v. Statutes.

Notice.

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Notice.

- Name of plaintiff's attorney not inserted in notice of a writ of *latitat* vitiates the notice. 58.
A motion for judgment, as in case of a nonsuit, upon the 14 G. 2. c. 17. held to be notice within the statute. 265.
If no body can be found on whom to serve notice of ejectment you may stick it up at the door. 266 and 272.
Of ejectment, held good at the house, though the premises lay in another county. 301.
Held that where there were joint owners notice ought to be served upon both; at least where they lived in separate houses. 301.
Of declaration in ejectment not to be delivered to servant of insane, but to committee. 401.

Nusance.

- A man shall not have a private action for a common or public nusance. 556.

Order of Nisi Prius.

- Explanatory words not to be added to the order when it is made a rule of court; but if necessary they must be made a separate rule. 151.

Order of Sessions.

- Application to remove by *certiorari* within what time. 544.

Original (Writ.)

- Suit by, where bad. 52.

Ouster. (Actual.)

- Held that it may be presumed. 768. v. Tenants in common.

Outlawry.

- When you come to reverse you must have the record in court. v. 348.
Vide 370.
Personal appearance not necessary to reverse, except in treason and felony. 372, 520, 521.

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Error in fact the attorney-general may be permitted to allow, though the error alledged be not true; otherwise error in law. v. 521.

Owner.

Wherever the lawful property may be identified and traced out the owner shall come and recover, when the thing has been unlawfully converted and changed: For though the possession has been changed the property is not. Nor will seizure into the hands of the crown, in such case, be a bar. v. 759. Trover. 2, 3.

Parent.

If the father appears improper to have the custody of the child, and the child be of too tender years to choose for itself, the power of the court of B. R. is discretionary in assigning the custody of the child. 749.

The power of the parent is subordinate to the power and authority of the state, in education of the child, as in other respects. 749.

Parish-Clerk.

It seems appointment of parish-clerk needs not to be in writing. 434.

Parliament.

Motion to stay proceedings till the event of a petition touching the cause depending in parliament refused. 436.

Powers derogatory to private property, though by act of parliament by one's own representatives, to be very strictly construed, and not extended. 442.

No man can demand a duty without an act of parliament. 754. v. Letters. v. Taxes.

Partnership.

Every partner is liable jointly and severally. 82.

Patent.

It does not seem to hold true that a patent cannot be granted for a new invention superadded to an old one. 395.

Pauper.

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Pauper.

Conviction of return of pauper should appear to have been by confession, oath, or view of the justice himself; and it should appear that he returned without certificate. 84.

Peerage.

Privilege of peerage will be noticed without pleading. 49.

Penal Action.

Vide Tythes. v. Statutes.

Peremptory.

A peremptory is always understood so as to be without prejudice to justice. 262, 263.

Perjury.

Must not only be a false swearing upon oath, and in a court having authority to administer an oath, and in a matter which is material to the cause, but it must be a wilful and deliberate false swearing: For if a man in the hurry of evidence, or from defect of memory, swears false, by error or surprize, this is not perjury; for there must be the mind of swearing false to make it perjury; and then it will be perjury, even if a man swears to a true fact, if it can be proved that he believed it to be false.

Vide 773. *et alibi.*

Pew.

In prescribing for a pew it is not necessary to alledge that he and his ancestors have always been accustomed to repair; for it is only evidence: And perhaps the pew never wanted repair. 423.

Plaint.

Defendant ought to remove with cause; plaintiff may without. 520.

Pleading.

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Pleading.

Action against a tenant for breach of covenant in not repairing the demised premises. Plea that the landlord did not assign him materials—bad ; for he should have shewn that he asked : And so plea that there were none proper to which he had a right ; for this is putting the issue not upon the fact but upon the law. 43.

Plea of *riens per descent*, how given by the statute. v. 264.

Plea.

It seems to be the practice that delay to demand a plea does not hinder your signing judgment the instant after you have demanded it. 333.

Possession.

Long, the effects of it. 315.

Possession is very favourable as a rule of certainty and an evidence of right, and for quieting disputes. 332.

Possibilities.

Assignable under circumstances. v. 43.

Posthumous.

Held that the statute of *W.* aids only in case of remainders. 398.

Post-Office.

Vide Letters, and v. Statutes.

Powers.

Expression of what the law implies though not expressed, in the deed under which the powers are derived, or by which they are reserved ; shall not prejudice the execution of powers. 319.

Preamble.

Vide Statutes, Construction of.

Prerogative.

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Prerogative.

The rule that the half blood shall not inherit does not affect the succession to the crown. 398.

Will never prejudice justice, or the rights of the subject. 90.

Prescription.

Cannot be where the creation of the thing in which it is claimed is within time of memory. 76, 77.

Presumption.

Held that putting in the name of a nephew in a lease renewable for lives carried *prima facie* a presumption only that his name stood as trustee; but that this might be repelled by parol evidence, shewing that he was intended to take for his own benefit. 230 to 232.

Presumption from non-payment of interest upon a bond is within no statute of limitations; but will depend upon circumstances and evidence. 320.

Of right of soil in an highway through a manor held to be in favour of the lord. 358. But it is not conclusive. Where there are owners of each side, and no body can speak to the antiquity of the road, or the property, the presumption changes, and is in favour of the owners on each side. 358 to 360.

Presumption that he who has separate fishery is owner of the soil. 364.

On a writ of right that may be a presumption which is not a bar.

Presumption of satisfaction by discontinuance on elegit. 651.

Every thing (not contrary to the known fact) is to be presumed against a person who will not shew his title. 523.

Vide Evidence.

Prison.

The court of B. R. has power over all the prisons in the kingdom; and they are all of them the prisons of the court. 436.

Privilege.

Of a member of parliament. v. 156.

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Of a party or witness attending process in going, continuing, and returning; and this protection afforded a lady, brought up by *habeas corpus*, against her husband. v. 434, 435.

Prohibition.

Where the foundation and principal subject of the suit is an ecclesiastical matter, and the temporal right only an incident, the ecclesiastical court shall proceed as long as they will try the matter as the common law would have done in such case, in respect of that which is temporal (for there is no defect of original jurisdiction); but if they refuse to try it as the common law would have it tried a prohibition shall issue.

Property.

Vide Owner.

Re-Entry.

Shall only operate as a security for the rent. 319.

Relation.

Vide Judgment.

Remainder.

Cross-remainders may be between more than two where the intent is plain. 112.

Between two the presumption is in favour of cross remainders; between more than two presumption is against them: But either may be repelled by evidence of intent.

Reporters.

The concurrent testimony of reporters, be they good or bad, is of great weight. 420.

Republication.

A codicil with three witnesses; and these words, "I desire this may be taken as part of my will," amounts to a republication of the will. 608, 609.

A. has

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A. has lands in *A. B.* and *C.* which he devises; afterwards he purchases lands in *D.* and makes a republication of his will. This can have no effect on the after purchased lands in *D.* where he had none at the making of the will. 609. v. Revocation. 6.

A. makes his will, with a general residuary clause; and afterwards is admitted in fee to a copyhold estate, which he surrenders to such uses as he should by his last will and testament direct; &c.

After the surrender he makes a codicil, attested by three witnesses, and having thereby given an annuity and his house and furniture at *H.* to Mrs. *C. D.* he goes on, "And do ratify
" and confirm all the devises and bequests which I have
" made in my last will and testament, except what I have
" hereby altered: And I do direct that it may be annex-
" ed and taken as a codicil to my will."

He had no copyholds at the time of making the will.

Held a republication by the statute, the codicil being subscribed by three witnesses. 752.

Reputation.

Vide Damages, Libel.

Restitution.

Vide Trover. 2.

Return.

Of two *nihilis* and judgment thereupon is not good without real notice, where it is to charge an executor with assets. 305 to 313.

The court not so strict upon the returns of inferior courts as formerly. 431.

Distinction between returns of mesne process and returns in execution. 332, 333.

Reversion.

Powers given under a settlement to make leases of present and not of future interest, and so as the same go with and be incident to the remainder and reversion. Reservation, with a view to the execution of these powers, held good, being made to the tenant in possession of the freehold, his heirs and assigns: For that, both by reason and authorities, heirs and assigns meant those to whom the remainder and reversion should go under the settlement. 319.

Rev.

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Revocation.

1. As to make a will there must be *animus testandi*, a mind and intention to make, so to revoke a will there must be *animus revocandi*, a mind and intention to revoke. And though since the statute a will can neither be made nor revoked without performance of the requisites prescribed by the statute, yet all the forms of making or of revoking must be accompanied by a sound and free mind (so far free as to be under no compulsion, terror or deception, as to the act done, in doing of it): And there must be an intention in the testator, in making or revoking his will, to make or revoke; which must in both instances accompany and direct the form to make either a good will or a good revocation. 470, 471.
 2. A revoking will revoked sets up the former, as a repealing statute repealed. 575, 576.
 3. A. devises estates in strict settlement; he afterwards makes a new contract, and then by his codicil passes the estates purchased under that contract to the same uses.
After this he unites the equitable estate which he had before by trustees to his use to the legal estate, by making an absolute purchase to himself in fee. This is not such a change of estate as will operate a revocation. 609 to 617.
 4. Constructive revocations against the intent ought not to be indulged: And some decisions of that sort, misunderstood, or overstrained, have brought a scandal upon the law. 614. v. also 293 and 297.
 5. A. declares his will void unless he return from Ireland; held that it was not revived by his return, but required a positive republication to set it up.
So when a feme sole makes her will and marries, the act of marriage merges her will, and it does not revive by the death of her husband without republication. 667.
- Of revocations on change of estate by act of law. 299.
- Marriage, with birth of a child, held a revocation. v. p. 171. v. the case of *Christopher v. Christopher*, mentioned in 4 *Bur.* 2171, and again 2182, to have been determined by Lord Chief Baron *Parker*, Mr. Baron *Smythe*, and Mr. Baron *Adams*, *dissentiente* Mr. Baron *Perrott*; and afterwards to have had the concurrence of Sir *Eardley Wilmot* and Lord Chief Justice *De Grey*, that marriage and a child is a revocation of lands, which is stronger than of personalty. Of personalty there are several cases, as *Lugg and Lugg*, *Overbury and Overbury*, and *Eyre v. Eyre*, that marriage and issue are a revocation: For which v. 4 *Bur.* 2169.

[Note.

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[*Note*, The case of *Glazier v. Glazier*, when I sent the note to the press, mentioned 575, 576, and in this table, was not then published by Sir *James Burrow*, I believe. But it is in his fourth volume. 2512 to 2515.]

River.

A navigable river is the king's highway for the use of himself and his subjects. 556.

Rules of Practice.

It seems four days to put in bail mean exclusive of the return day: And if the last day is a Sunday then the whole of Monday. 190.

If time of exception against bail is out, and you have not justified, you cannot justify after the time allowed; but you may avail yourself to stop an attachment against the sheriff. v. 224.

New trial to be moved within four days. 230.

A person who refuses to admit evidence which is only formally necessary to be shewn incurs costs. v. 248.

When a rule is made absolute you can't answer it, but must move to have it discharged if you want to be clear of its effect, and have sufficient grounds. 265.

There must be exceptions from the literal meaning of every rule, where the letter would work an injustice, or contradict the spirit of the rule: And therefore the court refused to discharge out of custody, for want of proceeding against a prisoner within two terms, where there was a mistake by two being of the same surname. 274.

Time of trial will be enlarged where a witness cannot be come at, and the other party, though the witness was abroad before the action commenced, and not returned since, refuses to admit the effect of his evidence.

Not to have a *non-precedendo* for want of transcribing; till you have first a certificate there is no transcript. 329.

No special arguments to be entered the last paper day of the term. 370.

When you move for a rule to shew cause the day before the last of the term the rule must be drawn specially for the last day. 436.

Rules designed to prevent fraud shall never be applied to the purpose of effecting it. 622.

When the sheriff is ruled to bring in the body he has four days exclusive. 631.

Vide also 653. and v. Amendment, Notice, Declaration, Plea, Judgment, Sheriff, New Trial, Superfedeas, &c.

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Scandalum Magnatum.

A peer may lay his action for this offence against him where he pleases: But on just ground of suspicion that there cannot be a fair trial the venue shall be changed: otherwise not. v. 210, 211.

Servant.

Shoemaker employs a man to make up shoes for him, and retains him by the piece, and this person being hired by another, and leaving his former service, the work unfinished, an action will lie (though not on the statute of *Eliz.*) for seducing him from that his former service. 493 to 495.

Settlement.

Marriage. v. Deed, Consideration.

Parish hiring from statute fair to statute fair seems a good hiring by the year to gain a settlement. 54.

Sheriff.

Answerable for the acts of his deputy. 81.

Return *non est inventus* with the name of sheriffs of the last year is a false return by the sheriffs of the present. 83. v. Return.

Indemnity given for a year to secure the sheriff against the acts of his bailiff. Afterwards the person undertaking gives notice, disliking the person employed, that if the warrants are delivered to that person he will not abide by his indemnity, this notice left at the office of the under clerk to the under sheriff. Held that the sheriff was not bound: And that the person who had given this indemnity could not discharge himself, unless by the consent of those in whose behalf it was given. 225 to 228.

Not entitled to poundage if judgment irregular. 253.

His return not traversable; but you may have action for false return. 371.

Not entitled to poundage till the goods are sold. 333.

Slander.

A woolcomber not stated to be a labourer must be intended to buy wool, and to be a trader. 322.

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Declaration, whereas he is a woolcomber, and a person had agreed with him for a certain quantity of wool, the defendant well knowing, &c. and intending, &c. spoke of him (laying a colloquium) "he, inuendo the plaintiff, is "not worth a penny, and he will run away." The court seemed to think the declaration sufficient, and the words actionable, and would not take away from the plaintiff the benefit of the verdict in his favour. 322, 323.

Slavery.

Cannot be supported by moral or political reasons; and in this country can be no further maintained than positive law will support it. *Somerset's case* p. 19.

The only species of slavery which can now exist in England is, if a man will confess himself a villain in gross in a court of record. v. p. 12 and 19. v. Villenage.

A slave in another country is not a slave in England; and the judges will not from analogy to any specie of slavery that ever did exist in England, construe him to be a slave in a certain qualified degree; for this country knows of no slavery in any degree not expressly limited and prescribed by the positive law of England. p. 17 to 19. v. Contract.

Specification.

Vide Patent.

Specific Performance.

Equity will not decree upon a bare agreement by parol, nor in part performed though it appear ever so clearly. 808 unless upon the ground of fraud. 814.

Part performance is not the tendering of conveyances, but must be some act done as in actual execution of the contract; not towards the execution. 813.

(Letter) I will give 16500l. Answer—I will not take less than 17000l. Answer returned, I will give 17000l. This is not an agreement executed in writing within the statute of frauds. v. 786 to 814.

The time of payment is very material, and where the time has been over passed, equity will not assist the person who has overpassed it in his demand of a specific performance. 813.

Where circumstances are greatly altered since an agreement, equity will rather leave the party injured by non-performance to his damages at law, than decree a specific performance.

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If you read the confession of an agreement by answer, you must read all relative to the agreement. 789.

Where an agreement appears in notes or letters, or by confession in defendant's answer, the court frequently enforces the specific performance; but then it must appear fully and completely, settled in all points. 801.

Where a person has declared he will not sell to such an one but for ready money, and another clandestinely attempts to purchase for the person so refused, and the money is not ready; such transaction is fraudulent, and the court will not enforce the performance of an agreement so obtained. v. 786 to 814.

Payment of earnest or delivery of possession of part, comes under the idea of part performance. v. 809 and v. Trover.

Stamps.

Vide p. 155.

Want of stamps does not avoid a deed; but only hinders its being given in evidence until stamped. 341. v. Statutes concerning bills of exchange.

Statutes.

General Rules of Construction.

1. Statutes on the same subject are to be construed together. 371.
2. The construction of private acts of parliament is to be governed by the principles of common-law, applied to the subject in a manner analogous to the rules of interpretation in a private deed or conveyance. v. 416.
3. Presumption of a general meaning not expressed, nor naturally implied, is very unfavourable and not to be received, at least upon a penal statute. 534.
4. In favour of the liberty of the subject ought to be liberally construed. 650.

Though the preamble be generally a key to the statute, yet it does not always open all the parts of it, but sometimes the legislature having a particular mischief in view to prevent, which was the first and immediate object of the statute recites that in the preamble, and then goes on in the body of the act, to provide remedy for general mischiefs of the same nature, but of different species not expressed in the preamble, nor perhaps then in contemplation. 783.

Concerning bail and bail-bond. v. 4 & 5 Ann. p. 395.

Bills of exchange. v. 5 & 6 W. & M. c. 21. f. 5. 9 & 10 W. 3. c. 17. 3 & 4 Ann. c. 9. f. 4.

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- Concerning charchwardsens. v. 3 Car. 1. c. 3. f. 2. 21 J. 1. c. 7. f. 5. v. p. 209.
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- Costs on attachment. v. 5 W. & M. c. 11. f. 3.
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Summary Proceedings.

Must proceed upon mutual benefit and equity. 329.

Sunday.

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Sunday.

Appears not a good day for appointment of overseers. v. 618 to 620.

Supersedeas.

Writ of error is not a supersedeas to execution, unless bail be put in within four days. 752.

Sweeping Clause.

Will not carry estates of a different nature from those expressed in the premises. v. 398, 399.

Taxes.

On a special verdict; action for money had and received. The jury find the island of Grenada in the possession of the French, and conquered by the British arms in 1762: They find it surrendered upon articles of capitulation on the 7th of February in the said year.

And that by those articles they are recognized as British subjects and to be governed, by their then present laws, until his Majesty's pleasure should be farther known; they are to enjoy their property and the same privileges as in the other leeward islands. And to what relates to taxes and imposts, they are referred to the 6th article, which gives them as above mentioned the same privileges with the leeward islands. And the natives may sell their lands, provided it be to British subjects, and retire.

They find the treaty of peace of the 10th of February 1763, ceding Canada of Acadia, and the islands amongst which Grenada, to the King and crown of Great Britain.

And they find a proclamation of the King of Great Britain the 7th of October 1763, promising a legislative assembly as soon as the state and circumstances of the new governments (amongst which Grenada is included) would admit; and that in the mean-while persons inhabiting, or resorting to the said colonies may confide in the royal protection, for the enjoyment of the benefit of the English laws, for the administration of which courts of judicature are ordered to be erected.

They find also a proclamation of the 26th of March 1764, directing a survey of the island, and a division into parishes and districts; with other provisions for the settlement and beneficial culture thereof.

And

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And farther they find Letters Patent of the 9th of April 1764, appointing Robert Melville, Esq; to be a governor of Grenada, the Grenadines, Dominica, Tobago and St. Vincent's; and directing him to govern according to his instructions received and to be received, and according to such reasonable laws as shall be made, by the advice and consent of the council and assembly of the islands under his government; and empowering him with the advice and consent of council, and as soon as circumstances shall admit, and when, and as often as need shall require to summon and call general assemblies of the said islands, jointly or severally, to be chosen by the authority of the freeholders respectively; and to the governor and council, with the advice and consent of the assembly, to make laws for the welfare, peace and good government of the said islands, jointly or severally, as near as may be according to the laws of England.

And they find that Governor Melville arrived in the island on the 14th of December 1764.

And that an assembly of the said island was held in the latter end of the year 1765.

But they farther find that his Majesty by his letters patent of the 20th of July 1764, ordered and appointed an impost or custom of four and an half in specie for every hundred weight of all dead commodities of the produce of the said island of Grenada, that should be shipped off from the same, in lieu of all customs and imposts upon goods exported and imported under the authority of the French King; reciting that such impost is paid by Barbadoes and the other leeward islands, and commanding the governor and officers of the customs from time to time; for the time being to collect and receive the same under such penalties and forfeitures; and in such manner as in the above mentioned leeward islands, and appointing the continuance of the poll-tax levied under the French King.

And the jury find the said imposts of four and a half per cent. as above mentioned was and is paid in the island of Barbadoes, and in the leeward Carribee islands, by virtue of acts of assembly of the said islands set forth in the verdict.

And they find the establishment of a custom-house and officers in the island of Grenada.

And they farther find that the plaintiff is a natural born subject of the King of Great Britain; and that on the 3d of March 1763, he purchased a plantation in the said island, in pursuance of the articles of capitulation and treaty of peace.

And they also find that certain sugars of the plaintiff of the growth of the said island subsequent to the grant, and registering

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gistering of the letters patent of the 20th of July above mentioned, were shipped off from thence; and that the defendant, being then and there a collector of the said duty for the use of his Majesty, received the same; and that the same is the money mentioned to be had and received to the plaintiffs use for which the action is brought; and that the defendant hath not paid over the same to the use of his Majesty, but on notice of the action intended to be brought hath with the consent of his Majesty's attorney-general kept the same in his hands, for the purpose of trying the question arising upon facts.

And whether the said impost were lawfully imposed or not, the jurors are ignorant and pray the advice of the court.

And if upon the whole matter found it shall appear to the court, that the impost or custom aforesaid was not lawfully imposed; then they say the defendant did undertake and promise, as the defendant has in his plea alledged; and assess the plaintiff's damages at 5*l.* and costs at 4*s.*

But if the court be of opinion the impost was lawful, then they find the defendant did not undertake in a manner and form as by the plaintiff in his plea alledged. *v.* the case and arguments from 655 to 738.

Determined by the court.

1*st.* That the King by his prerogative might, before the proclamation of the 7th of October 1763, have laid the impost in question upon Grenada as a conquered country,—without consent of the parliament of England, or act of the people of Grenada, in their assembly or otherwise,—by his prerogative.

But 2*d.* that after the said proclamation, and before the patent of the 20th of July 1764, for laying on the impost, the King had precluded himself from so doing; and therefore that the said impost was void. 738 to 748.

Tenants.

1. In common, though several, are but as one person or party in law. 401.
2. The possession of the one is the possession of the other, and will prevent a bar being incurred under the statute of limitations; but not so where the possession of one has been adverse to the title by tenancy. 768, 769. *v.* Actual ouster.

Testament.

Distinction between will and testament. *v.* Will.

Toll.

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Toll.

Toll for corn malt shall be considered as corn; because acts of parliament have so considered it, otherwise the specification makes it a new thing; and therefore flour was not liable. 72.

Of a lighthouse not rateable, because the toll is not locally related to the parish. 78.

For toll traverse a consideration must be laid. 464.

Where a consideration is laid you must prove it as laid; even in cases where it was unnecessary to have laid any. 464.

Consideration of being bound to repair good, without alledging actual reparation. 465.

After verdict consideration will be presumed, either the same as laid, or a good one. 465.

Trial.

Slight causes of delay will not be allowed after notice given of trial. 58.

Where the evidence is positive, and greatly preponderates on one side, the court will not incline to grant a new trial in the first instance, but you may indict the witness of perjury. 87, 88.

Trial at bar will not be granted where the party applying refuses to consent to the usual terms of mutual justice and convenience. 159.

Granted, and will be granted out of an issuable term upon proper occasion. 159.

Trover.

1. Supposes a lawful coming by the goods demanded, and an unlawful conversion. 89.

Detention against lawful demand presumes conversion. *ibid.*

2. **Trover** is good to recover where a felon has stolen goods, and changed them into notes, if the note clearly appears to be the product of the specific goods; and the owner of the goods, who has prosecuted to conviction, and has omitted to pray restitution, shall recover them in trover, though seized into the hands of the King, by an action against the sheriff. 89, 90.

3. *A.* buys plate of *B.* the defendant, and gives him a draft; for which *A.* gives receipt as for cash. *A.* pawns the plate to *C.* the plaintiff, who was a pawnbroker, shewing him the receipt as evidence of his title, on which *C.* took the goods.

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goods in pawn. The draft turned out afterward to be a bad one; for *A.* had no money with the banker. *A.* was tried on the statute for procuring under false pretences on an indictment preferred by the defendant *B.*; he was convicted, *C.* the plaintiff producing the goods. *B.* the defendant, upon this took and detained them; *A.* brought his action of trover thereupon—And held, “that he should recover; for that the property was not changed as against the right owner, either at common-law, or by the statute of *James* respecting pawnbrokers.” 187.

4. *A.* the plaintiff agrees to exchange the *Folly*, his own vessel, with the *Roker*, the plaintiffs, and to give twenty-five guineas to boot; and, if the *Folly* was lost in the voyage she was then upon, thirty guineas: Besides the plaintiff paid a guinea earnest.

Defendant wrote to excuse himself, that he could not make the exchange because he had sold the vessel; plaintiff tenders twenty-four guineas, deducting one for earnest; defendant refuses. Afterwards in another voyage the *Folly* is lost, and plaintiff brings the action for the value. Held the action well lay for the delivery was complete by payment of the earnest, and the defendant's detention of the vessel afterward was tortious. 219 to 221.

5. Plea of general release sufficient in bar of trover. 323.
6. *A.* assigns to *B.* and *C.* *B.* sells to *D.* who gives a promissory note payable in fourteen days; after this *D.* assigns to *E.* all his goods. The note never having been paid, *B.* refuses to deliver. The possession of the seller, after the agreement and note, is the possession of the buyer, and trover will well lie for the goods, especially as *B.* being desired by *D.* to take back the goods, said “I will not, I will have payment,” which affirmed the sale. 325, 326. v. Larciny.

Trustee.

Cannot vary the mode of sale prescribed. 66, 67. nor the security prescribed. 492, 493.

Tythes.

Modus set up since the 13th of *Eliz.* binds not the successor. 66.

Temporary composition requires notice to determine. 66.

Endowment of tythes without usage fails. *ibid.*

Claim of more tythes than there are tytheable goods. *ibid.*

Mispleader of a modus it seems produces a decree in kind but without prejudice. *ibid.*

Action

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Action for double damages for rymes, used as a method of trying the right, and not considered as a penal action. 232 to 234.

Undertaking.

Held so far revocable before signing, that an attorney, who had written but refused to sign it, should not be liable to action for non-performance. 193.

University.

The court will have an eye to its discipline, where it takes cognizance of a cause from it, as out of its jurisdiction. 42.
Vide Master and Fellows.

Usage.

Good to explain doubtful words in a charter. 77.

Usury.

Computation upon an usurious contract held good from the time of payment, to take the cause of action out of the statute of limitations. 51.

Where the object of a contract is borrowing and lending of money at more than the legal interest, no shift, colour or contrivance, will take the agreement out of the statute; but if the substance be a sale or other fair transaction, and the party buying may pay whenever he pleases at a fair price, and has credit given him in the course of trade, but if he does not pay within the time, then he is to pay an advanced sum of so much per cent. this will not be usury because it is contingent, and in the nature of a penalty for the delay, and a compensation for the risk. 595 to 600.

Vagabond.

Who he is, how to be punished, and by whom. v. 85.

Variance.

Between judgment and writ of error, the addition in the writ being "Esquire," and in the judgment "Gentleman." v. 274.

Venue.

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Venue.

That not in transitory only but in local actions the court will change the venue, if there be an urgent call of justice, not otherwise to be answered. Per Lord *Mansfield*. 50.

After your plea pleaded, you are not to move to change it. 321.

The plaintiff has his election in transitory actions; the defendant cannot change to a county where the cause did not arise, except upon special circumstances. 395.

Change not to be so granted as to operate unnecessary delay. 395.

Verdict.

A verdict shall be set aside for excessive damages, where the jury have gone out of the case. v. 28, 29.

Difference of opinion amongst the jury, and they agree the majority shall decide—verdict good. 71.

Where the verdict is mistaken in bar, form or mere circumstance by the misprision of the clerk it seems this may be amended; otherwise where it is a variance of substance, as to the point of law or form essential to maintaining the case. 147.

It seems where a special case has been reserved, a new trial has been granted without previously setting aside the verdict. 451.

Court must judge upon facts found. 573. v. Evidence.

Villinage.

The last confession of villinage 335 years, from this present year 1776. v. p. 19. v. Slavery. v. *Harris's Justinian*, l. 1. tit. 3.

Wager.

Equal wager between parties to a cause touching its event, with a view to mutual indemnification in some degree against the loss, held not a contempt of the court in which the cause was depending; not immoral; not illegal. 383 to 388.

Warrants.

To break open houses under a general warrant for apprehending the authors, printers and publishers, of a seditious libel, without names of the offenders, is illegal. v. *Wilks's case*. 17 to 20.

Warrant under due authority excuses the officer, 236, otherwise where the person who issued the warrant had no authority over the matter.

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Warranty of Goods.

General warranty that an horse is found, is without exception of ignorance of the seller at the time of sale. 146.

Wheat.

If a man, who practices keeping of barley for the purpose of distilling contrary to the prohibition of the statute, mixes wheat with it, he is liable to have both seized; (and was before the statute had made express provision) and setting up a mill for colour will not exempt him. 179 to 182.

Will.

Will operates by our law as an appointment of uses, according to which the testator means the lands should go after his death, and therefore must be of lands in possession at the making of the will, unless he expressly says, (or whereof I shall be hereafter seized) and it is not like a substitution of an executor by testament of personal, or of universal heir, as to realty as by the Roman civil law; and therefore a new will does not with us necessarily import a revocation of the old. v. 574.

Where a fee passes without express words of limitation. 95, 96, 100.

Intention to be found out from the whole of the will. 97.

A devise over shall take effect where a contingency, supposed, precedent has never happened. 97.

1. *T. M.* seized of lands in diverse counties holden in common fee, and of certain customary lands in 1723, makes a settlement in consideration of marriage to himself for life, remainder to trustees for the usual purposes, remainder to his heirs male by his wife, reversion to himself in fee, with provision for raising portions for younger children.

After the marriage he purchases diverse other lands freehold and copyhold, and in 1725 mortgages a part of his freehold, and in 1731, having four children, two of each sex, makes his will, gives his jewels to his wife for life, remainder to his son *W.* and if he die without issue, remainder to his son *E.* absolutely; like limitation of the furniture of his capital mansion-house—his personalty to be applied in payment of debts and legacies.

Directs his son to surrender the customary estates in borough English to his brother; gives to his youngest, *Edward*, the estates in gavel-kind in tail-male; remainder to the eldest son in tail-male; remainder to such son as shall be born to the testator after his decease: like limitation of his freehold estates in *M.* and *G.*; only the elder preferred before the younger;

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younger ; and if it shall so happen that his said sons *W.* and *E.* and any after-born son shall die without issue-male of their bodies, then and in such case, and for want of such issue of his sons then living, and of any son or sons lawfully begotten and hereafter to be born, the rest and residue not before disposed to his brother *J. M.* for life, remainder to trustees (for the usual purposes), remainder to *J. M.* the younger for life, remainder to the heirs-male of his body ; remainder to *C.* the second son of his brother, with remainders as before ; remainder to his own right heirs in fee.

And he appoints his wife executrix and guardian of the children together with her and his own brother.

Power to his eldest and also to his youngest son to make leases for payment of portions, and raising jointures, when they come into possession respectively ; and so, in like manner, to his brother, &c. and his heirs-male, as they should respectively come into possession.

Words relating to the after-born issue were interlined, and not noticed in the attestation.

No after-born issue came into being ; nor any issue but those at the time of making the will.

Held, that the devise over to his brother was good, either as an immediate devise of the reversion under the settlement, after failure of issue of the marriage ;

Or else as a remainder after estates-tail, by implication to after-born sons of another marriage.

Or 3dly, as a devise upon a double contingency ; namely, if my sons by the now marriage die without issue, and if my sons by this or any other marriage die without issue, then over to my brother, and the latter contingency having never happened, that the devise over should be good. v. from 160 to 178.

The best rule in the construction of wills, v. Construction.

2. *J. L.* makes his will in 1748, being seised of chambers in Lincoln's Inn, and a considerable sum of money arising from lands which were sold under an act of parliament, and were to have been re-vested in land, but were not, and he was tenant in tail, reversion to himself, in fee under the settlement in the intended lands ; and he devises to his dearly beloved friend *Mrs. F. H.* all his real and personal estate, whatsoever and wheresoever, subject only to two or three small pecuniary legacies, one of which is to his niece and heir at law.—Afterwards in 1756 the jury find that he made another will in writing, duly executed, and attested by three subscribing witnesses, and that the disposition of the said will of 1756 was different from the will of 1748, but in what respects they know not ; and what is become
of

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of it they know not: and they further say, that they do not find the testator cancelled, or the defendant; the general devise destroyed it.

The Lord Chief Justice *De Grey*, Mr. Justice *Gould*, and Mr. Justice *Nares*, held this a revocation; and that the first will was barred by the second; that the heir not claiming under either will was not bound to shew it, but the devisee must shew the second was not against her, and that the will being subscribed by three witnesses must be taken to have been of real estate, and therefore to be a revocation of the former real devise; and the difference found must be taken to be a general difference, or at least would put the devisee to her title, which if she did not prove in what extent it subsisted, would be bad for the whole for the uncertainty; for that the heir having a clear, certain, absolute title, it must be defeated by a certainty, and the will which defeats it must appear to be the last will of the testator.

On the other hand, Mr. Justice *Blackstone* and all the judges of the court of King's Bench were of opinion,

That the finding must be taken as it is, being as full as the jury could make it upon the evidence.

That, by the case of *Hitchins* and *Basset*, another will does not necessarily revoke the former; it may consist with it. That a difference does not import a revocation; for it may be as to some particular not affecting the general scope of the will nor the title of the general devise; that when the devisee shews a title by devise, that title is a clear certain title, no less than of the heir by descent; and must stand, as his did before, till certainty be shewn against it;

That the statute of frauds meant to guard against all constructive devises, not resulting from the necessary act of law, or the declared solemn intent of the party duly expressed and attested according to the statute; and that therefore revocations, which were strictly interpreted even at common law, and not extended by latitude of construction to defeat an established will, were not now to be implied and collected by conjecture, since the statute. v. 282 to 300, and 558 to 576. And the House of Lords affirmed the judgment of B. R. *ibid*.

3. Limitation to all and every my daughter and daughters, and the heirs of her and their bodies, and on failure of all and every the daughters aforesaid, and all and every their issue, limitation over—held, they took cross remainders, 443 to 450.

4. “ In case my personal estate, which I have before devised to
“ my wife, shall not be sufficient, I devise my lands in A.
“ for payment of debts: and, if not sufficient, the reversion
“ of my wife's jointure to be liable; all the rest and resi-
“ due of my real and personal estate I give to my wife;”

The

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The personalty was sufficient for payment of debts.

Held, that either the wife took the real estate as not devised from her at all, being only devised on a contingency which never happened of the personalty being insufficient for payment of debts;

Or 2d, that there was a resulting trust for her benefit in so much of the real, as should be surplus after payment of debts not satisfied by the personal. And that this in the event being the whole, she was intitled to the whole. 452 to 455.

5. "Whereas my wife is now pregnant, if she bring forth a son, I desire he may have my estate when he comes to 21 years, paying (certain annuities expressed in the will): but if she has a daughter, a moiety to my wife; the other moiety to my two other daughters, share and share alike; if either of them die before twenty-one, then survivorship to the daughter; but if both die before twenty-one, then the whole to my wife."

No son was born, nor any daughter: the daughters in being died without issue under age.

Held, that the wife should take the whole, as if the contingency of a son or daughter being born and dying as expressed above, had happened, the intent being, that on want of issue the wife should take, whether on failure of such as were expressed, after they should have come into being, or on their never existing. 455—457.

6. A. makes his will in 1759, and at the same time executed and published an exact duplicate: the testator was a labouring man, and said he did it to make his wife easy who was near her death, but that it was not a will to his liking. The duplicate was left with his daughter.

He afterwards sends for his attorney, tears off the seals, and orders the witnesses names to be cut out; which was done in his presence. He made a new will the same day, with express clause of revocation, and gave it the attorney to keep, saying he would not have the heir find it.

Afterwards, being in his senses, he sent for his second will, and ordered the attorney to come and make a new one: the will is sent; but before the attorney came, the testator was out of his senses, and died the same day without making any other will.

The second will was found cancelled after his death, together with the first cancelled, both in one paper: the duplicate of the first was found uncanceled in one of his drawers after his death, but uncertain when or how it came there;

Held, that the cancellation of the first will in his own possession was a full and effectual revocation both of it and of the duplicate; both being but one will, and the duplicate out of his possession: and farther, that the revocation of the

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the second will did not in this case set up the first, the first not being simply revoked, but destroyed by the cancellation. 465 to 471.

7. *A.* in 1732 being seised of diverse premisses, freehold and copyhold, and intitled to other copyhold as mortgagee, makes his will, and devises all his freehold and copyhold, &c. to his wife; afterwards he purchases the copyhold which he had as mortgagee, and in 1735 surrenders to uses declared and to be declared by his last will and testament in writing. And in February 1736, he strikes out of his will a legacy to the poor of *H—*, and enters a memorandum, attested by two witnesses, that it was struck out by his order and in his presence, he having paid it in his life-time;

Held, that by the surrender the copyhold purchased after the will made, well passed, as amongst the uses which the testator in his will had said were declared.

That as to the second point, it was unnecessary to consider whether republication or not; nor equally clear; but that it seemed the striking out of the legacy was a republication of the will as to the rest not altered. 604 to 608.

Vide Devise, Double Legacy, Cross Remainder, Revocation, Republication, Residuary Clause, Sweeping Clause, Codicil, Construction, Executor, &c.

Witnesss.

Who may be a witness. v. 183.

A man may be received as a witness who proves his own turpitude: it goes not to his admissibility but his credit. 757—758.

Affidavit to put off trial for absence of material ——— That *A.* is a material witness in the cause, and is major of a regiment, which regiment is beyond sea at such a place, held bad—though perhaps it might have done, if there had appeared to have been merits. 187 to 188.

Affidavit to put off trial for want of a material ——— must be full to the cause, and shew that you have such a witness who is material to the cause, and that there are reasonable hopes of producing him, if the trial be put off. v. 653. *et alibi*; and you should be ready to admit necessary facts that only are of form to be proved by witnesses. 769.

Words.

Most of the disputes in the world rather about words than things. 176.

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Affidavit that they the deponents nor any of them never received—held a good and sufficient denial; and that if false, and they had received, the words were full enough to subject to an indictment of perjury. 275.

General words after special usually refer to things *ejusdem generis*, of the same nature with the antecedent. 324 and 325.

Writ.

Writs, double, not allowed by the court. 248.

Of enquiry—in a case to determine what was due from a master to his clerk; suggestion, that the jury at Guildhall were low and indigent and not proper judges, and therefore prayer, that it might be executed in London—discharged. 65.

Of error—where faulty, whether to amend, or sue out a new one. 272.

Ought not to be disturbed on motion. 653, 654.

Sued out before judgment. v. Judgment.

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